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RECORD, CASE No. 14,118.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 403.

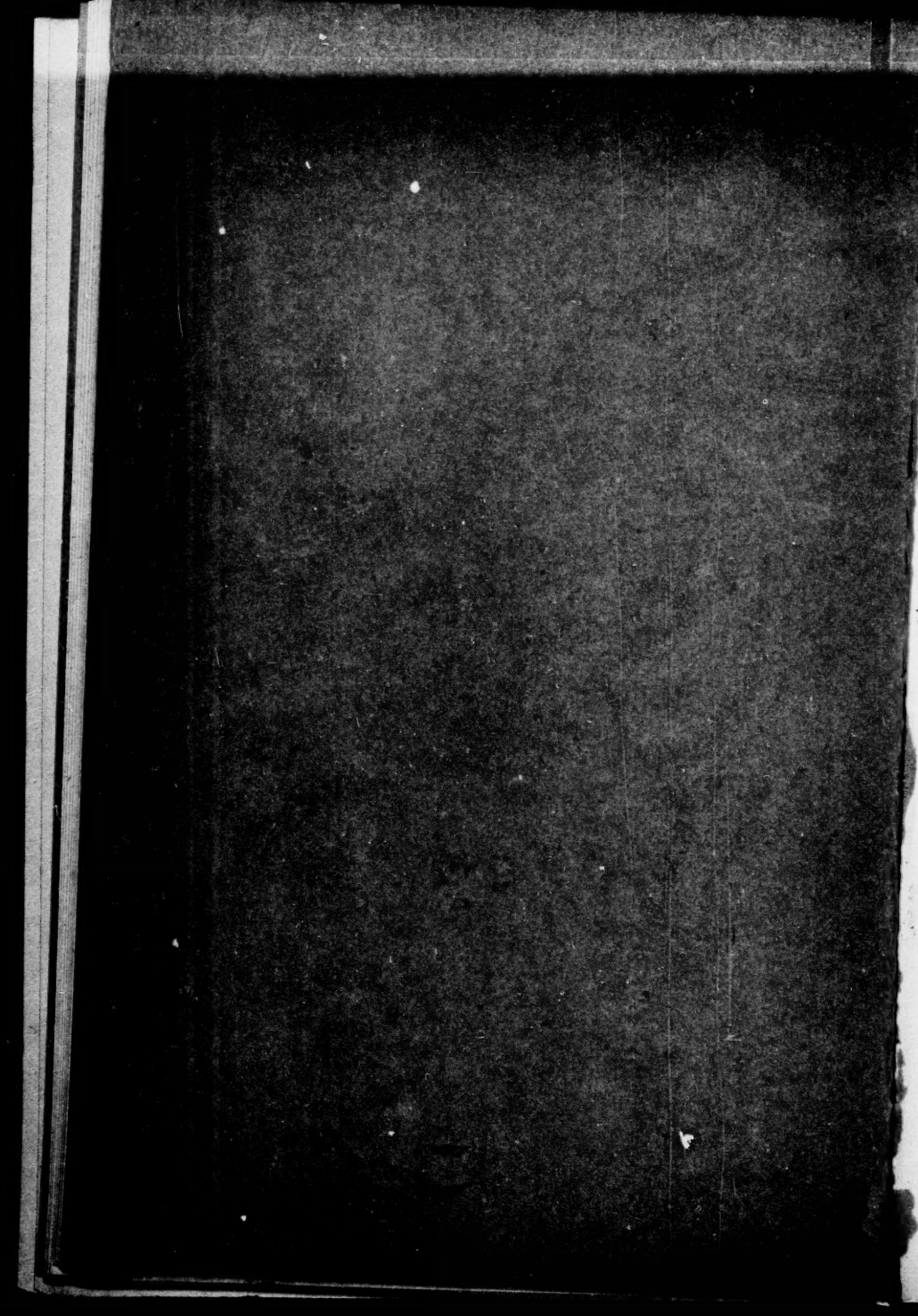
THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

ELIZABETH J. DENTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED AUGUST 28, 1890.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1892.

1 THE STATE OF TEXAS, }
County of El Paso. }

At a term of the circuit court of the United States for the western district of Texas, begun and holden at the city of El Paso, El Paso county, State of Texas, on the first Monday, being the 7th day, of April, A. D. 1890, and which adjourned on the 25th day of April, A. D. 1890, the Hon. T. S. Maxey, judge of said district, presiding, the following cause came on for trial, to wit:

ELIZABETH J. DENTON
vs. } No. 62.
SOUTHERN PACIFIC COMPANY.

On the 11th day of October, A. D. 1889, the plaintiff, the said Elizabeth J. Denton, filed in said cause her first amended original petition, which is in words following, to wit:

In the United States Circuit Court for the Western District of Texas, at El Paso, April Term, 1889.

To the honorable the judges of said court:

Now comes plaintiff, Elizabeth Jane Denton, and by leave of the court files this her first amended original petition in lieu of the original petition herein filed on Jan. 29th, 1889, and for amendment says—

That plaintiff is a citizen of the State of Texas and resides in the county of Red River, in said State; that defendant is a corporation duly incorporated under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and is and at the institution of this suit was a resident of El Paso county, in the State of Texas, and is known as the Southern Pacific Company.

That the claim of plaintiff exceeds the sum of two thousand ($2,000) dollars, exclusive of interest and costs; that heretofore, to wit, on January 31st, 1888, prior and subsequently thereto and at the institution of this suit, defendants were and are engaged
2 in the business of running & propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio and the city of San Antonio, all of the State of Texas; that defendant is now doing business as aforesaid, and has an agent for the transaction of their business in the city and county of El Paso, Texas, to wit, W. E. Jessup; that on January, on the 31st, 1888, one Dan. Denton was in the employ of defendant in the capacity of brakeman, and in the discharge of his duties on said date last named, in obedience to orders, was on defendants' train of cars drawn by engine No. 618, said train being an eastward-bound freight train; that defendants did then and there carelessly and negligently direct, run, and operate said train of cars, and through such mismanagement, carelessness, and negligence the train of cars drawn by engine No. 618 did, with great force and vio-

lence, run against and collide with another of defendants' train of cars operated by defendants, when both trains were near the station of Paisano, a station on defendants' said railway in the county of Presidio, State of Texas, said collision occurring on a single track, and by reason of said collision both the aforesaid trains were greatly injured, damaged, and wrecked; that said collission occurred without any blame, fault, or neglect on the part of the said Dan. Denton, and was due solely to the mismanagement, carelessness, and negligence of the defendants, The Southern Pacific Company; that in the collision of the said train the head and body of the said Dan. Denton was so crushed, wounded, and bruised that the said Dan. Denton thereafter, in consequence and by reason of said injuries, on or about January the 31st, 1888, died; that deceased, Dan. Denton, was a young man about thirty years of age, a strong and able bodied man, with a reasonable expectation of thirty years more of life; that deceased, Dan. Denton, at the date of his death was earning and his services were reasonably worth the sum of one hundred ($100) dollars per month, or twelve hundred ($1,200) dollars per annum;

3 that deceased, Dan. Denton, left surviving him the plaintiff, who is his mother and a widow sixty (60) years of age, and did not leave surviving him any father, wife, or child; that said Dan. Denton was prior to his death a contributor to the support and maintenance of the plaintiff herein, and that plaintiff had a reasonable expectation of further contribution from her said son, Dan. Denton, for her maintenance and support in the future and during the remainder of plaintiff's life; that by reason of the death of Dan. Denton, caused, as aforesaid, without any fault, blame, carelessness, or negligence on the part of deceased, Dan. Denton, damages have resulted to plaintiff, Elizabeth Jane Denton, the surviving widow — mother, to the amount of four thousand nine hundred and seventy ($4,970) dollars.

Wherefore, the premises considered, plaintiff prays the defendant be cited to answer the petition, and that she have judgment for the said amount of damages, for costs of suit, and for such general & special relief as to the court may seem proper.

GRAHAM SMITH AND
BENDY & MITCHELL,
Att'ys for Plaintiff.

4 Thereafter, to wit, on the 7th day of April, A. D. 1890, the said defendant filed in said cause its 1st supplemental answer or demurrer to plaintiff's 1st amended petition, raising question of jurisdiction, which is in words following, to wit:

In the U. S. Circuit Court, Western District of Texas, at El Paso.

ELIZABETH J. DENTON
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 62.

Now comes the def't in the above cause, and by leave of the court files its 1st supplemental answer or demurrer and says it is for the

special purpose and no other until the question herein raised is decided of objecting to the jurisdiction of this court, and def't excepts and demurs to the pl'ff'- 1st amended original petition and says it appears therefrom that the plaintiff is a citizen of Texas, residing in Red River county, said State (a county not within the judicial district in which this cause is pending), and that the defendant "is a corporation duly incorporated under the laws of the State of Kentucky" and a "citizen of the State of Kentucky," though "engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending easterly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio and the city of San Antonio," Texas, and having "an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup."

Wherefore it appears that this suit ought, if maintained at all in the State of Texas, to be brought in the district of the residence of the plaintiff—that is to say, in the eastern district of Texas—and defendant prays judgment whether this court has jurisdiction, and it asks to be dismissed with its costs, but should the court overrule this demurrer and exception defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer.

DAVIS, BEALL & KEMP,
Atty's for Def't.

5 And on the 9th day of April, 1890, came on to be heard the defendant's said 1st supplemental answer or demurrer raising the question of jurisdiction, and the court rendered its judgment thereon as follows, to wit:

In the United States Circuit Court, Western District of Texas, Sitting at El Paso.

ELIZABETH J. DENTON
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 62.

On the 9th day of April, 1890, came the parties to the above cause, by their attorneys, and then came on to be heard the defendant's demurrer to the plaintiff's 1st amended original petition, by which demurrer was raised the question of this court's jurisdiction upon the facts alleged by plaintiff, and, the argument of counsel being heard, it is the opinion of the court that the law is for the plaintiff. It is therefore ordered by the court that said demurrer be overruled, and that plaintiff recover of defendant the costs of said demurrer, and thereupon to this judgment of the court the defendant excepted.

6 And on the same day, to wit, on the 9th day of April, 1890, the defendant filed its original answer, which is in the words following, to wit:

The defendant's demurrer, raising the question of the court's jurisdiction being overruled, the defendant answered as follows, though excepting to the ruling of the court in overruling said demurrer:

ELIZABETH J. DENTON *vs.* SOUTHERN PACIFIC COMPANY. } No. 62. Suit Pending in U. S. Circuit Court of Western District of Texas, at El Paso.

Now comes the defendant in the above-entitled suit, by attorneys, and for plea in this behalf says that the matters and things set forth and alleged in the petition of plaintiff are not sufficient in law to entitle her to recover a judgment thereon, and of this it prays the judgment of the court.

DAVIS, BEALL & KEMP,
Att'ys for Defendant.

And, further answering herein, defendant, by its attorneys, denies all and singular the allegations in the petition of plaintiff contained; and of this it puts itself upon the country.

DAVIS, BEALL & KEMP,
Att'ys for Defendant.

Further answering, defendant says that if the deceased named in plaintiff's petition was in fact killed by the defendant that his negligence and want of care contributed to the injuries he re-
7 ceived, and that he ought not to recover; wherefore defendant prays judgment.

DAVIS, BEALL & KEMP,
Att'ys for Defendant.

And for further answer the defendant, by its attorneys, says that if the deceased named in plaintiff's pleadings was in fact injured and killed as alleged that he was at the time a servant and employee of defendant, and that his injury and death was caused by the negligence of his coemployees and fellow-servants, wherefore he ought not to recover, and defendant prays judgment.

DAVIS, BEALL & KEMP, *For Def't.*

And on the 9th day of April, 1890, the cause coming on to be heard, judgment was rendered in the words following, to wit:

ELIZABETH J. DENTON *vs.* THE SOUTHERN PACIFIC COMPANY. } 62.

This the 9th day of April, 1890, this cause coming on to be heard, came both parties, by their attorneys, and argument of counsel was heard by the court on defendant's demurrer as to the jurisdiction of the court in this cause, and, the same being considered of by the court, it is ordered that the same be overruled in all things; to which rulings of the court the defendant excepts.

Thereupon both parties announced ready; then came a jury of

good and lawful men of the western district of Texas, to wit, James Marr, as foreman, and eleven others, who were duly tried,
8 selected, empannelled, and sworn, and, having heard the evidence, argument of counsel, and charge of the court, retired and afterwards returned into open court, on their oaths, the following verdict, to wit:

We, the jury, find for the plaintiff in the sum of four thousand five hundred and fifteen dollars ($4,515).

JAMES MARR, *Foreman.*

It is therefore ordered and adjudged by the court that the plaintiff, Elizabeth J. Denton, do have and recover of defendant, Southern Pacific Company, the sum of four thousand five hundred and fifteen dollars (4,515), with legal interest, at 8 per ct. per annum, from this date, besides all cost in this behalf expended, for which execution may issue.

And on the 25th day of April, 1890, came on to be heard the defendant's motion for a new trial, which the court overruled in words as follows:

ELIZABETH J. DENTON
vs.
SOUTHERN PACIFIC COMPANY. } No. 62.

This day this cause coming on to be heard and both parties being present, by their attorneys, thereupon came on to be heard defendant's motion for a new trial, and the argument for counsel being heard and the court, having carefully considered the law and evidence presented, is of the opinion that the law is with the plaintiff.

It is therefore ordered by the court that defendant's motion for a new trial be, and is hereby, overruled in all things, and that plaintiff do have and recover of defendants all costs in this behalf expended.

9 The defendant's aforesaid motion for a new trial was filed on the 10th day of April, 1890, & is in words as follows:

ELIZABETH J. DENTON
vs.
THE SOUTHERN PACIFIC COMPANY. }

Now comes the defendant in the above cause, by its attorneys, and moves the court to grant a new trial for the following reasons:

1st.

The court erred in overruling the defendant's demurrer raising the question of the court's jurisdiction.

2nd.

The court erred in holding that the defendant's plea that decedent's injuries were caused by the negligence of a fellow-servant was not sustained and in so instructing the jury.

3rd.

The verdict found is grossly excessive and not warranted or sustained by the evidence.

DAVIS, BEALL & KEMP, *For Def't.*

10 And on the 25th of April, 1890, the defendant filed its bill of exceptions (as of the 9th of April, 1890) in words as follows, to wit:

In the Circuit Court of the United States for the West. District of Texas, at El Paso.

ELIZABETH J. DENTON
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 62.

Be it known that on this the 9th day of April, 1890, the above cause coming on for trial, the defendant presented its demurrer to the plaintiff's 1st amended original petition, by said demurrer raising the question of this court's jurisdiction, as follows, after stating the title of the cause: "Now comes the defendant in the above cause and by leave of the court files its first supplemental answer or demurrer and says it is for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court, and defendant excepts and demurs to the plaintiff's 1st amended original petition and says: It appears therefrom that the plaintiff is a citizen of Texas, residing in Red River county, said State (a county not within the judicial district in which this cause is pending), and that the defendant is a corporation duly incorporated under the laws of the State of Kentucky and 'a citizen of the State of Kentucky,' though 'engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio and the city of San Antonio, Texas, and having an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup;' wherefore it appears that this suit ought, if maintained at all in the State of Texas, to be brought in the district of the residence of the plaintiff—that is to say, in the eastern district of Texas; and defendant prays judgment whether this court has jurisdiction, and it asks to be dismissed with its costs; but
11 should the court overrule this demurrer and exception def't then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

And the court having inspected the same as well as the pleadings of the plaintiff, and it appearing therefrom that the plaintiff is alleged to be a citizen of Texas, residing in Red River county, in the eastern judicial district of said State, and that the defendant is a corporation created and existing under and by virtue of the laws of Kentucky, and is a citizen of that State, but operating a line of railway doing *doing* business in and having an agent on whom process

may be served in the county and judicial district in which this suit is pending, and the court, being of opinion that the facts alleged show this cause to be in the district of the residence of the defendant, and that it ought to take cognizance of the same, overruled said demurrer in its judgment as follows:

"ELIZABETH J. DENTON
vs.
SOUTHERN PACIFIC CO. } No. 62.

This the 9th day of April, 1890, this cause coming on to be heard, came both parties, by their attorneys, and argument of counsel was heard by the court on defendant's demurrer as to the jurisdiction of the court in this cause, and, the same being considered of by the court, it is ordered that the same be overruled in all things; to which ruling of the court the defendant excepts."

And the defendant then and there in open court tenders this its bill of exceptions, and the same, being now during the trial of said cause allowed, is at the same time signed, sealed, and, as prayed by the defendant, made a part of the record of the cause and the same is ordered to be filed this the 25th day of April, 1890, as of the 9th day of April, A. D. 1890.

T. S. MAXEY, *Judge.*

12 And on the 10th day of May, 1890, the said Southern Pacific Co. filed its writ-of-error bond with certificate of solvency and duly approved as follows:

Supreme Court of the United States.

Know all men by these presents that we, the Southern Pacific Company, signing this bond by E. P. Hill, its agent, and E. P. Hill, of Houston, Texas, are held and firmly bound unto Elizabeth J. Denton in the full and just sum of seven thousand dollars to be paid to the said Elizabeth J. Denton, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this the 2nd day of May, 1890.

Whereas the above-bound Southern Pacific Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the circuit court of the United States for the western district of Texas, sitting at El Paso, wherein the said Elizabeth J. Denton, at the April, 1890, term of said court, in cause No. 62, recovered a judgment against the said Southern Pacific Company for four thousand five hundred and fifteen dollars, besides interest and costs:

Now, therefore, the condition of this obligation is such that if the above-named Southern Pacific Company shall prosecute its said writ of error to effect and answer all damages and costs if it

fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY,
By E. P. HILL, *Agent.* [SEAL.]
E. P. HILL. [SEAL.]

13 THE STATE OF TEXAS, }
County of El Paso. }

I, E. H. Vasmer, clerk of the district court in and for said county, do hereby certify that E. P. Hill and —— ——, whose names appear signed to the annexed bond, are, in my opinion, good and ample security for the amount therein specified; that they have property in said county subject to execution of a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

Witness my hand and seal of office, at Houston, Texas, this 2nd day of May, 1890.

[SEAL.]

E. H. VASMER,
Clerk District Court, Harris County,
By JO. ANDREWS, *Deputy.*

The foregoing bond is approved the 3rd day of May, A. D. 1890.

T. S. MAXEY, *Judge.*

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Elizabeth J. Denton and the Southern Pacific Company, a manifest error hath happened, to the great damage of the said Southern Pacific Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 10th day of May, in the year of our Lord one thousand eight hundred and ninety, & the seal of said circuit court is hereto affixed.

GEO. WYTHE BAYLOR,
Clerk of Circuit Court, West. Dist. of Texas, at El Paso.

Allowed this May 3, 1890.
T. S. MAXEY, *Judge.*

[Endorsed:] 62. Southern Pacific Co., pl'ff in error, *vs.* Elizabeth J. Denton, def't in error. Writ of error. Filed this the 10th of May, 1890. Geo. Wythe Baylor, clerk U. S. cir. c't, west. dist. Texas, at El Paso.

15 In the United States Circuit Court for the Western District of Texas, at El Paso.

I, George Wythe Baylor, clerk of the United States circuit court for the western district of Texas, at El Paso, do hereby certify that on the 22d day of May, 1890, a true copy of the foregoing writ of error was lodged in my office by the plaintiff in error for the adverse party in this case, No. 62, and styled Southern Pacific Company, pl'ff in error, *vs.* Elizabeth J. Denton, def't in error; all of which appears from the records of said court now in the clerk's office.

The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.

In testimony whereof I hereunto affix the seal of said court, at El Paso, Texas, and sign the name of the clerk thereof, this 15th day of August, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk of said Circuit Court,
By —— ——, *Deputy Clerk.*

16 To Elizabeth J. Denton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court for the western district of Texas, at El Paso, wherein The Southern Pacific Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error is mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. S. Maxey, judge of the said circuit court, this the 3rd day of May, in the year of our Lord one thousand eight hundred and ninety.

T. S. MAXEY, *Judge.*

[Endorsed:] 62. Southern Pacific Co., pl'ff in error, *vs.* Elizabeth J. Denton, def't in error. Citation in error. Filed this the 10th day of May, 1890. Geo. Wythe Baylor, clerk U. S. C. C., west. dist. Texas, at El Paso. Returned served June 3rd, 1890. Geo. Wythe Baylor, clerk U. S. C.

16½ The attached citation in error came to my hands on the 27 day of May, 1890, and I executed and served the same on the 27th day of May, 1890, by delivering a true and certified copy of the same to N. B. Bendy, in person, in the city of El Paso, Texas, the said N. B. Bendy being and his name appearing on the docket as the attorney of record for the above-named Elizabeth J. Denton.

ROB. A. NASS,
Deputy U. S. Marshal.

Sworn to and subscribed before me this the 3rd day of June, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk U. S. C.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.]

17 And thereafter, to wit, on the 19th day of July, A. D. 1890, plaintiff in error filed its assignment of error and prayer for reversal, which is in words as follows, to wit:

THE SOUTHERN PACIFIC COMPANY, Pl'ff in Error,
vs.
ELIZABETH J. DENTON, Def't in Error.

Now comes The Southern Pacific Company, plaintiff in error, by its attorneys of record, and assigns the following as error committed in the proceedings had below:

The court erred in overruling the defendant's demurrer to the first amended original petition of the plaintiff and in entertaining jurisdiction of the cause, for the reason that the jurisdiction was founded only on the fact that the action was between citizens of different States, the plaintiff being alleged to be a citizen of Texas and the defendant a citizen of Kentucky; that it appeared from the pleading demurred to that the plaintiff resided in Red River county, Texas (not in the western district of Texas), and that the defendant was a corporation created under the laws of Kentucky, and that the suit was not brought in the district of the residence of either the plaintiff or defendant.

SOUTHERN PACIFIC COMPANY,
By its attorneys of record, DAVIS, BEALL & KEMP.

And now comes the said Southern Pacific Company, pl'ff in error, and prays that the judgment against it in the court below be reversed.

SOUTHERN PACIFIC COMPANY,
By its attorneys of record, DAVIS, BEALL & KEMP.

18 In the United States Circuit Court for the Western District of Texas, at El Paso.

I, George Wythe Baylor, clerk of the United States circuit court for the western district of Texas, at El Paso, do hereby certify that the foregoing is a full, true, and correct transcript of the papers filed and all the proceedings had, together with the original citation and writ of error and a copy of the assignment of error and prayer for reversal filed by the plaintiff in error, in case No. 62 and styled Southern Pacific Company, pl'ff in error, *vs.* Elizabeth J. Denton, def't in error, all of which appears from the records of said court now in the clerk's office.

In testimony whereof I hereunto affix the seal of said court, at El Paso, Texas, and sign the name of the clerk thereof, this 15th day of August, A. D. 1890.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.]

GEO. WYTHE BAYLOR,
Clerk of said Circuit Court,
By —— ——, *Deputy Clerk.*

[Endorsed:] No. —. United States circuit court, western district of Texas, at El Paso. Southern Pacific Co., pl'ff in error, *versus* Elizabeth J. Denton, def't in error. Certified copy of the record in the court below for the U. S. Supreme Court. Fee, $——.

[Endorsed:] Southern Pacific Co., pl'ff in error, *vs.* Elizabeth J. Denton, def't in error. From the United States circuit court for the west. district of Texas, sitting at El Paso.

Endorsed on cover: Case No. 14,118. W. Texas C. C. U. S. No. 403. The Southern Pacific Company, plaintiff in error, *vs.* Elizabeth J. Denton. Filed August 28, 1890.

146 U.S. 202

Office Supreme Court U. S.
FILED.
NOV 7 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

v.

ELIZABETH J. DENTON.

Term No. 403.

In error to the Circuit Court of the United States for the Western District of Texas.

BRIEF OF ARGUMENT,

In Reply to Brief for the Plaintiff in Error.

STATEMENT OF FACTS.

It was erroneously stated at page 4 of the former brief filed in this Court for the defendant in error, that the Southern Pacific Company was doing business in 1889 under the Texas Act of April 2, 1887, counsel being then unaware that that act was repealed in April, 1889 (Texas Laws of 1889, p. 88).

The repeal of the act does not, however, affect the argument at page 11 of that brief, which is that, by the settled decisions of this Court, a corporation of one State may consent to be sued, or to be bound by service of process on its agent, in another State, and does so consent

if it does business in a State whose laws provide for such suit or service. The unconstitutionality or repeal of a statute requiring its formal consent, under penalty of a revocation of its license for failure to so consent, obviously does not remove the presumption of law that it consents by continuing to do business there.

In the leading case on this question there was no statute requiring the company's consent to such service of process, but it was held that the statute providing for such service created an implied condition precedent to the company's doing business in the State, and that "in legal contemplation" the company assented to it.

Lafayette Life Ins. Co. *v.* French, 18 How., 404.

This Court has since expressly upheld the statute of Texas providing for service of process on the resident agent of a foreign corporation.

Societe Fonciere *v.* Milliken, 135 U. S., 304.

MOTION TO AFFIRM.

The Merits of the Controversy.

The merits of the controversy raised by the motion to affirm are discussed under subhead "*Fifth*" at p. 11 of the brief heretofore filed. The proposition advanced in support of the motion is, *that the defendant below had consented to be summoned and sued in the Western District of Texas, and was therefore bound by the judgment.* To this the learned counsel replies that that proposition is disposed of by the case of Shaw *v.* Quincy Mining Company (145 U. S., 444), which settles the case at bar on the merits in favor of the plaintiff in error.

But the facts in that case and in this are not the same. That was a suit by a citizen of one State (Mas-

sachusetts) against a corporation of another State (Michigan) in a third State (New York), and the decision, not only necessarily, but in terms, is carefully restricted to those facts. Hence, that decision does not decide the case at bar.

The questions in the two cases are different. In the case at bar it is whether consent to be sued in a certain District, which is not the residence of either plaintiff or defendant, waives the privilege granted the defendant by the Act of August 13, 1888, or estops him from pleading it. But no such question arose in Shaw *v.* Quincy Mining Company, as is apparent from the statement of facts on which that decision was made.

The material facts in that case were that, whilst the Michigan Company was doing business in Michigan, it was authorized to hold stockholders' meetings in New York, and to have its principal office there; and the Court held that these things did not make it a resident or inhabitant of New York within the meaning of the Act of 1888. That was manifestly the sole question decided.

In so deciding the Court incidentally ruled that, as Congress, in the Act of 1888, had omitted the provision of the Acts of 1789 and 1875, authorizing suits against a person in any District "in which he shall be found," it intended that neither a natural nor an artificial person should be sued outside of the District of his residence, except in the District of the plaintiff's residence. This ruling is plain and perspicuous, but it has naught to do with the case at bar on the merits, which raises the question whether a defendant may not waive that privilege, or be estopped by agreement from pleading it.

Now, it has already been decided that the Federal District in which a defendant may be sued under the

Act of August 13, 1888, is matter of personal privilege.

Railway Co. *v.* Cox, 145 U. S., 593.
Railway Co. *v.* McBride, 141 U. S., 127.
Fitzgerald Co. *v.* Fitzgerald, 137 U. S., 98.

Consequently it may be waived; because "a party may waive any provision, either of a contract or a statute, intended for his benefit," (Shutte *v.* Thompson, 15 Wall., 151, 159.) It is waived by a mere pleading, or a technical appearance, as the above-mentioned cases decide; and *a fortiori*, it is submitted, it is waived by a contract to be sued in a particular District, or the defendant is estopped by the contract from pleading it.

It has been shown that the Southern Pacific Company, in consideration of a license to do business in Texas, consented to service of process on its agent in El Paso County, Texas—that is to say, in the Federal Western District of Texas—though it now claims that it is not bound by the contract, and asks the aid of this Court in repudiating it. In dealing with a similar attempt in *Ex parte* Schollenberger (96 U. S., 369), the Court refused its aid. In solving the question there raised, it held that the company's consent to be *served* in the District was a consent to be *found* there, within the meaning of the then-existing law. That ruling in its letter is not applicable to the case at bar, for the word "found" has since been eliminated from the law; but in spirit it soars above the technicality to which it was there bound, and, resting on its true sustaining principle, a consent *to be sued*, it governs this case as it did that. The opinion says:

"It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued

there . . . We entertain no doubt that it (the statute there involved) made the company liable to suit where this suit was brought . . . There cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies."

This was *the principle* underlying that decision, and in it is no word about a consent to be "found" in the jurisdiction. Neither of the two earlier cases on which this principle was grounded (Lafayette Insurance Co. *v.* French, 18 How., 404, and Railroad Company *v.* Harris, 12 Wall., 65) depended on a consent to be *found.* Both of them depended solely on a consent *to be sued,* and the jurisdiction was deduced from that in those cases, as it was in *Ex parte* Schollenberger.

In the last-named case the Court say: "They have agreed that they may be sued there, that is to say, that they may be found there;" but it is too patent for argument that this is a mere fiction of law made to satisfy the letter of the Act of 1875. The word "found" in that act in respect of a natural person means a bodily presence in the District, and a natural person could "*consent* to be found there" only by going there bodily. Hence a corporation, which must stand on the same footing as a natural person under the statute, can consent to be found in a foreign jurisdiction only by actually going into it; but as "it cannot migrate" it cannot do this, and therefore it cannot "consent to be found there"—except by a fiction. In fact, it really consents to be sued, though actually *not* found, there.

If a fiction was available under the Act of March 3, 1875, it is equally available under the Act of August 13, 1888. The latter act, by omitting the provision in the former for a suit in the Federal District where a defendant may be found, manifestly did not intend to obliterate the great principle, antedating all statutes of the United States on the subject, that a defendant may

yield up his privilege of exemption from suit in a particular jurisdiction by consenting to be sued there. In this case the company's agent resided in the Western District of Texas, for the express purpose of having process served on him in suits against it; and therefore, under the fiction *qui facit per alium facit per se*, the company itself resided there for the purpose of being sued. There is no question but that this Court decided in Life Ins. Co. *v.* Woodworth (111 U. S., 138), that a corporation might be deemed to acquire a "domicile" in a foreign State, and there is therefore no difficulty in now deciding that it may be deemed to acquire a secondary "residence" or "habitation" there within the meaning of the Act of 1888, if such a decision were necessary to prevent a failure of justice. Nor would it be doing any violence to the intent of the act, as deduced from the knowledge and expectation of its framers, for Congress must be deemed to be well aware of the fact that the Federal jurisdiction over corporations on the ground of diverse citizenship rests wholly on fiction.

Now, after the passage of the Act of 1888, and notwithstanding it, the Southern Pacific Company entered into a contract with the people of Texas, among whom was Mrs. Denton, to be "*sued in any court within this State having jurisdiction of the subject matter*," and therefore in the Circuit Court for the Western District of Texas (*Ex parte* Schollenberger, *supra*). In the conduct of its business it killed her son in the Western District of Texas, but she happened to live in the Eastern District, and the question was whether she must go into the State of Kentucky to sue the company, or whether the company must go unwhipped of justice because it had no agent (as appears by this record) in the Eastern District subject to service of process. In the courts of the State she might have sued within the ter-

ritorial limits of the Federal Court for the Western District, as has been heretofore shown, *because the company had consented to it;* and for the same reason, it is submitted, she might sue in the Circuit Court.

By Section 1 of the Act of August 13, 1888, the Circuit Court was given jurisdiction over this cause of action, and over these parties as citizens of different States, "*concurrent with*" the courts of Texas; and it is therefore not to be supposed that, in the same section, Congress intended to divest it of a part of that jurisdiction by the proviso under consideration. And further, it cannot be assumed that in an underhanded way, by omitting the provision in the Act of March 3, 1875, authorizing suit in a District where a defendant might be found, Congress specially intended to discriminate against the Federal jurisdiction over corporations. In fact, we know that this was not the case, for on consideration it struck out a paragraph in the original bill which made such a discrimination (Cong. Record, 49th Cong., 2d Sess., p. 613). Hence, the jurisdiction of a Circuit Court over a foreign corporation must be exactly commensurate with that over a non-resident natural person. Shaw *v.* Quincy Mining Company substantially so rules.

In a Federal Court a natural person can now only be sued in the Federal District of his own or the plaintiff's residence, and, singularly enough, in view of the change of the law's phraseology, in either instance he must be "found" there, in fact, for service of process; and so, by a fiction of law, a corporation defendant must be "found" in either Federal District before summons can be served on it. Heretofore it has been shown that the Southern Pacific Company consents to keep an agent in Kentucky, upon whom writs may be served, and if it had an agent in the Eastern District of Texas it would

be deemed to consent to be sued there. Consequently, a corporation, after all, can practically only be sued under the Act of 1888, where it consents to be sued, and on the other hand it always is "found" where it consents to be sued. The Act of 1888, therefore, was not intended to provide that a person, natural or artificial, should *not* be sued where he was *found*, or where he *consented* to be sued.

Wherefore the Act of 1888 was not intended to deprive a natural person of the right, recognized for centuries, of submitting himself to any tribunal of otherwise competent jurisdiction, if he so pleased; the exemption was for his benefit and might be waived. If the Southern Pacific Company were to sue Mrs. Denton in the Federal Court for the Western District of Texas, and she consented to appear and to be bound by the judgment, manifestly this Court would not vacate that judgment; and if Mrs. Denton sues the Southern Pacific Company in the same District, and the company consents to be bound by the judgment (as in Texas Pacific Co. *v.* Cox, and other cases, *supra*), the rule is the same. Wherefore it is already settled that a corporation *may consent* to be sued out of the District of its residence, in like manner as a natural person, under the Act of 1888.

As heretofore shown, it has been settled (in Insurance Co. *v.* French, and other cases, *supra*) that the Southern Pacific Company *has consented* to be sued in the Federal Courts for the Western District of Texas.

Why, then, should the jurisdiction not be upheld in the case at bar? There can be no reason found, in view of the said decisions, except that, having once consented to be so sued, the company is now attempting to repudiate the contract. But such repudiation is fraud, for Mrs. Denton, in common with other citizens of the State, acted on it, licensing the company to do

business there on the faith of it, and in doing business under that license the damage and wrong she complains of were done. It would, therefore, seem to be a case for the application of the doctrine of estoppel, as much so as if the company had once waived the statute of limitations and afterwards attempted to rely on it. (Randon *v.* Toby, 11 How., 493.)

The great principle underlying all the decisions of this Court on the subject, whether a natural or an artificial person is interested, is that a defendant may consent to be bound by a judgment in a jurisdiction where he is neither a resident, inhabitant, nor found, and that if he does so consent voluntarily no court will relieve him. It appears in the leading case of Insurance Co. *v.* French, where it was held that the vital question was, not whether the corporation was in the foreign jurisdiction, but whether it had consented to be treated as if it were there; in *Ex parte* Schollenberger, where it was said that, if citizenship were sufficient, a corporation might consent to be sued anywhere it pleased; in Life Insurance Co. *v.* Woodworth, where it was held that consent to be sued in a State was the equivalent of a domicile there; and in Pennoyer *v.* Neff (95 U. S., 714, 735), which sanctions the English doctrine, "that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment, in which that particular mode of notification has been followed, even though he may not have actual notice of them." Wherefore the technical ruling, by way of a legal fiction, that consent to be sued in a particular jurisdiction is a consent to be found or to reside there, is unnecessary, and it is submitted that there are at least two cases in which this Court have substantially so decided.

In *Ex parte* Louisville Underwriters (134 U. S., 488), citation was made in the Eastern District of Louisiana upon the agent of a corporation of Kentucky, to which service the corporation had consented. It was resisted on the ground that the defendant was not an "inhabitant," as required by the Act of August 13, 1888. The Court held that that act was not applicable, and it showed that the Act of March 3, 1875, and Sec. 11 of the Act of September 24, 1879, never had been in force in the Federal Courts sitting as courts of admiralty; and yet the service of citation was sustained, because the defendant had consented to be sued there, on the authority of Lafayette Ins. Co. *v.* French, *Ex parte* Schollenberger, and N. E. Ins. Co. *v.* Woodworth. That is to say, it was held that Federal Courts had jurisdiction of suits in admiralty against defendants not "inhabitants" of the State or district, if they had consented to be sued there, *without the existence of an enabling act authorizing suit if they should be "found" there.* Hence, that provision of the Act of March 3, 1875, was not necessary to confer jurisdiction upon non-resident defendants *who had consented to be sued in the court*, and therefore its repeal by the Act of August 13, 1888, did not change the law *in a case like that at bar.*

Railroad Company *v.* Harris (11 Wall., 65) is a still stronger case. The Baltimore and Ohio Railroad Company had been incorporated in Maryland, but it was licensed by the legislature of Virginia to do business in that State (66), and by Congress to do business in the District of Columbia (67), upon substantially the same terms that were provided in Maryland. At the date of the institution of the suit, it was provided by act of Congress that only a person who was "an inhabitant of or found within said District" could be

sued there (70), but there was no law authorizing the service of writs on the agents of foreign corporations residing there (69). The company pleaded in abatement that it was not an inhabitant, and not found, in the District (70), which the plaintiff traversed in his replications, relying on the act of Congress licensing it to do business there (71). The overruling of the demurrers to these replications was assigned for error (79). The Court held that the company was, by clear implication from the terms of the licenses, suable in Virginia and in the District of Columbia, because it had consented to those terms (83). And it then held that the pleas in abatement were bad (84). That is to say, the Court held that *a plea of not an inhabitant, or not found, under the statute, is no answer to a suit in a court where the defendant has consented to be sued.*

The Pleadings in the Case.

Both the merits and the technical questions in Railroad Company *v.* Harris were ruled on by the Court, and it is therefore expedient to reply briefly to the argument of the learned counsel for the plaintiff in error on the pleadings in the case at bar.

The first four points made in the former brief go to the unavailability of the demurrer in the court below, and the last two to its unavailability in this tribunal.

First. To this point it is replied that the want of jurisdiction appears on the face of the declaration. It may be so, as an inference from other facts stated, and as the result of a legal argument, *but not as a statement of fact.* The question being whether the declaration avers that the suit was brought in the District of the residence of the plaintiff or defendant, the answer is that it does. There are many cases in this Court which hold that jurisdictional allegations must be posi-

tive, and not inferential; as, for example, that an averment of residence is not equivalent to an averment of citizenship (Robertson *v.* Cease, 97 U. S., 646). *E converso*, the averment of the citizenship of this corporation in Kentucky cannot be equivalent to an averment of its sole residence there, in a case where its residence is the jurisdictional fact to be determined, and particularly where its residence in Texas is specifically averred.

If it be suggested that it could only be a resident of Texas by being also incorporated there, the answer is *non constat* but that it is incorporated there. And if it be argued that then the Circuit Court had no jurisdiction, because both parties were citizens of the same State, the answer is that that objection cannot be entertained here, upon that assumed fact, because it was not raised in the Court below (cases cited p. 14 of former brief), or in this Court by the assignment of error.

Second. The reply to this point is that the allegation of residence is the plaintiff's conclusion of law from the facts recited (p. 24), or a meaningless allegation of an impossible fact (p. 27), in either of which events it is not admitted by the demurrer. It is obviously not an impossible fact, for the incorporation of the company in Texas would constitute it a resident there. Whilst dependent on statutory law, it is obviously not a conclusion of law, but a fact stated according to its legal effect, which is good pleading (Sullivan *v.* I. S. Mining Co., 109 U. S., 550, 555).

If the averment of name or of residence is erroneous, it must be reached by a plea.

Cartwright *v.* Tabert, 3 Tex., 261.
Tousey *v.* Butler, 9 Tex., 525.
Tryon *v.* Butler, 9 Tex., 553.
Gildart *v.* Grumble, 22 Tex., 15.

And where exemption from suit depends upon residence, the defendant must not only aver a residence elsewhere, but deny the residence alleged—for a person may well have two residences.

Crawford *v.* Carothers, 66 Tex., 199.

Third. It is urged that the statutes of Texas involved in this point cannot be held to confer a jurisdiction denied by the Federal law; but, as above shown, a suit in the Western District of Texas was a personal privilege which the defendant might waive, and if he did so (*i. e.*, submitted himself to the jurisdiction by a special appearance) no one is to blame but himself. He might have refused to appear, and yet have been amply protected if there was no jurisdiction (York *v.* State of Texas, 137 U. S., 15). If no ultimate harm is wrought by the statute in question, as the last-mentioned case has decided there is not, then it is a part of the Federal practice under Section 914 of the Revised Statutes; for Congress was therein aiming at uniformity of pleading and practice, and an innovation on established custom cannot be considered, so long as it is not destructive of legal rights.

Fourth. On this point it is maintained that the reservation by the defendant below, of the right to except to the ruling of the Court on the demurrer, prevented the application for a continuance from being a general appearance. A similar reservation was made in Railway Co. *v.* Whiteley (77 Tex., 126), but very properly without avail.

Sixth. The reply to this point is that the argument, that the special appearance was conditioned by its terms to be special only until the decision on the demurrer was made, is erroneous. To which it is only necessary to say that the language of the paper speaks

for itself. It is tantamount to advising the Court: "I appear specially if I win, and generally if I lose"—a fast and loose style of appearance which cannot be tolerated. Or, in another point of view, it says in effect: "I hereby appear generally for the defendant, to take effect, however, when the demurrer has been ruled on," which is a general appearance in the first instance.

Seventh. Harkness *v.* Hyde (98 U. S., 479) is cited to show that pleading over in bar, after demurrer overruled, does not abandon the ground of demurrer. That was a case in which the service of process was not only without the jurisdictional limits of the Court, but had not been assented to by the defendant. Here the facts were the exact reverse. Railroad Co. *v.* Harris (*supra*) was a case substantially like that at bar, and it was held that "if it were desired to bring up the judgment upon the pleadings for examination by this Court, the company should have stood by the demurrers."

Respectfully submitted:

D. A. McKNIGHT,
Attorney for Defendant in Error.

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Office Supreme Court U. S.
FILED.
OCT 19 1892
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

v.

ELIZABETH J. DENTON.

Term No. 403.

In error to the Circuit Court of the United States for the Western District of Texas.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, by her attorney, and moves the Court to dismiss the above-entitled cause for want of jurisdiction, and in support of said motion she avers and shows that the sum in controversy is less than five thousand dollars.

And she further moves the Court to affirm the judgment of the court below, if the record shall show the jurisdiction of this Court, and in support of said motion she avers and shows that said judgment is sustained by well-settled judicial decisions, and that the writ of error was taken for delay only.

D. A. McKNIGHT,
Attorney for Defendant in Error.

BRIEF OF ARGUMENT.

STATEMENT OF FACTS.

Mrs. Denton in 1889 brought suit against the Southern Pacific Company for damages, for the unlawful killing of her son, in the Circuit Court for the Western District of Texas. Her petition (fols. 1–3) prayed judgment for $4,970, and contained the following averments:

"That plaintiff is a citizen of the State of Texas, and resides in the county of Red River, in said State; that defendant is a corporation duly incorporated under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and is and at the institution of this suit was a resident of El Paso County in the State of Texas.

"That heretofore, to wit, on January 31st, 1888, prior and subsequently thereto and at the institution of this suit, defendants were and are engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio, and the city of San Antonio, all of the State of Texas; that defendant is now doing business as aforesaid, and has an agent for the transaction of their business in the city and county of El Paso, Texas."

None of these averments have been traversed. Red River County, where the plaintiff resided, is in the Eastern Judicial District of Texas; and El Paso County, where the defendant had an agent and was doing business, and Presidio County, where the killing was alleged, and Bexar County, in which is San Antonio, are in the Western Judicial District (Act of February 24, 1879, Secs. 2 and 3; 20 Stat., 318). The record does not show whether the defendant was doing business or had an agent in any county in the Eastern Judicial District.

The suit was instituted in the Western Judicial District under authority of the following statutes of Texas,

"providing and fixing the venue of suits against foreign corporations" and "the mode of serving process on such corporations," etc:

"SECTION 1. Foreign, private or public corporations, joint stock companies or associations, not incorporated by the law of this State, and doing business within this State, may be sued in any court within this State having jurisdiction over the subject matter, in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or when the defendant corporation has no agent or representative in the State, then in the county where the plaintiffs or either of them reside.

"SECTION 2. In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association, or acting corporation or association."

Act of April 4, 1887; Laws of 1887, p. 131.
Act of March 31, 1885; Laws of 1885, p. 79.
Rev. Civ. Stat. Texas, 1879; Art. 1198, subd. 21; Art. 1223.

In United States *v.* So. Pac. R. Co. (49 Fed. Rep., 297), it has been found that "the Southern Pacific Company is a corporation of Kentucky, but it has no property or business there, nor any officer or agent there except an assistant clerk, holding a subordinate position and maintained for the purpose of preserving the charter of the company under the laws of the commonwealth," and that its general offices are in San Francisco, California.

The local statute under which the defendant com-

pany was doing business in Texas in 1889 provides as follows:

"Any corporation for pecuniary profit, organized under the laws of any other State, or of any Territory of the United States, or of any foreign country, desiring to transact business in this State, shall be and is hereby required, on and after January 1, 1888, to file with the Secretary of State a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State."

Act of April 2, 1887; Laws of 1887, p. 116.

The record does not show whether service of process was made on the defendant's agent. It appeared by attorney, and filed a demurrer to the plaintiff's petition (fol. 4), substantially reciting the averments of the petition above quoted, except that alleging that it was a resident of El Paso County, and stating as follows:

"Now comes the defendant in the above cause and by leave of the court files its first supplemental answer or demurrer and says it is for the special purpose and no other until the question herein is decided of objecting to the jurisdiction of this court. . . .

"And defendant prays judgment whether this court has jurisdiction, and it asks to be dismissed with its costs, but should the court overrule the demurrer and exception defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

The demurrer was overruled (fol. 5), and the defendant excepted (fol. 6), and thereafter filed a plea and answer on the merits (fols. 6 and 7). The case was tried, and the jury found for the plaintiff in the sum of $4,515,

for which judgment was entered (fols. 7 and 8). A motion for a new trial was overruled, and defendant filed a bill of exceptions (fols. 8–11). This writ of error was sued out in 1890 (fol. 14). The assignment of errors (fol. 17) alleges as error the court's overruling of the demurrer and entertaining "jurisdiction of the cause," it appearing from the petition "that the suit was not brought in the district of the residence of either the plaintiff or defendant."

The defendant's demurrer appears to have been founded on Section 1 of the Act of Congress of August 13, 1888 (25 Stat., 433), conferring on the circuit courts original jurisdiction concurrent with the courts of the States in certain cases (including the case at bar), which provides as follows :

"And no civil suit shall be brought before either of said courts by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The questions before this Court are, therefore, whether this Court has jurisdiction of the case on writ of error, and, if so, whether the court below was right in overruling the demurrer, or whether the plaintiff in error can raise the issue of jurisdiction in this Court.

MOTION TO DISMISS.

The judgment for $4,515, shown by the record, is insufficient to give this Court jurisdiction (Sec. 3, Act of February 16, 1875; 18 Stat., 315).

The Act of February 25, 1889 (25 Stat., 693), giving this Court jurisdiction to review judgments in cases "in which there shall have been a question involving

the jurisdiction of the court," and limiting its review of judgments less than $5,000 to "such question of jurisdiction," it is submitted, does not cover the case at bar, for the reason that no question involving the court's jurisdiction was raised below.

The demurrer purported to question the court's jurisdiction, but in fact it questioned only the right of the plaintiff to sue in the circuit court of the western district of Texas, under the Act of August 13, 1888 (*supra*). The language of that act shows that Congress was merely fixing the venue of suits in cases in which "jurisdiction" attached by virtue of diverse citizenship "only," which was the case here; and since jurisdiction thus attached, and was admitted by the demurrer to have thus attached, it could not be dependent on the suit's being brought in a particular district within the jurisdictional limits of the court. The venue of the suit is therefore matter of personal privilege and not of jurisdiction.

Inhabitancy and residence of the defendant, in respect of the locality of a suit, are matter of privilege, and not properly of jurisdiction.

> Gracie *v.* Palmer, 8 Wheat., 699.
> Railway Co. *v.* McBride, 141 U. S., 127, 131.
> Railway Co. *v.* Cox, 145 U. S., 593, 603.

"If the case were one of want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him. . . . Now, this was a personal privilege, which it was competent for the party to waive. The cases of Pollard *v.* Wright (4 Cranch, 421) and Barry *v.* Foyles (1 Peters, 311) are

decisive to show that after appearance and plea the case stands as if it were brought in the usual manner."

Toland *v.* Sprague, 12 Pet., 300, 330.

Hence it has been decided that it is not necessary to aver as jurisdictional facts that the defendant was an inhabitant or resident of the district at the time of serving the writ.

Gracie *v.* Palmer, *supra.*

In some of the opinions of this Court, the institution of the suit out of the proper district has been referred to as a jurisdictional question, perhaps, but it is submitted that that is not the true significance of the Act of August 13, 1888.

MOTION TO AFFIRM.

If defendant in error has erred in her motion to dismiss, it is nevertheless submitted that there was color in it, as illustrated in several similar cases.

McCormick Co. *v.* Walthers, 134 U. S., 41.
Parker *v.* Ormsby, 141 U. S., 81.
Railway Co. *v.* McBride, 141 U. S., 127.

It is submitted further that the motion to affirm should be granted for the several following reasons:

First. The demurrer was properly overruled because it was defective as a pleading.

Under the statutes of Texas (*supra*) suit was properly begun in the western district, where the defendant had an agent; for these statutes are applicable to suits in the circuit court.

Societe Fonciere *v.* Milliken, 135 U. S., 304.

Since the jurisdictional averments in plaintiff's petition were complete, even to the matter of residence, if the defendant was exempt from such suit under the

Act of August 13, 1888, it should have moved to quash the citation, or it should have filed a plea of personal privilege; for the real question at issue is the proper service of process, and, since under the statute of Texas (*supra*) the defendant might have consented to be served in the western district, the question was one of fact, which could not be determined under a demurrer.

Robinson *v.* Nat. Stock Yard Co., 12 Fed. Rep., 361.
Nones *v.* Hope M. L. Ins. Co., 5 How. Pr., 96.

In Texas the practice is to file a motion to quash, or a plea of venue or privilege.

Life Ins. Co. *v.* Hanna, 81 Tex., 487.
Railway Co. *v.* Whiteley, 77 Tex., 126.

It is a settled rule of pleading, sanctioned by this Court, that, the jurisdictional facts having been properly averred, such an exemption must be raised by a plea in abatement.

Chitty's Pleading, 442–444.
Evans *v.* Gee, 11 Pet., 80.
Carter *v.* Bennett, 15 How., 357.
Wickliffe *v.* Owings, 17 How., 47.
DeSobry *v.* Nicholson, 3 Wall., 420.

"By one of those rules, believed to be without exception, it is ordained that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only."

Sheppard *v.* Graves, 14 How., 505, 510.

Where the jurisdictional allegations are not traversed they cannot be raised before a jury or treated as within the issues.

Deputron *v.* Young, 134 U. S., 241.

It has been held that a demurrer in abatement is unknown to the law, and entitles the plaintiff to final judgment.

Tyler *v.* Hand, 7 How., 573, 584.
Furniss *v.* Ellis, 2 Marshall, 14.

Though it may lie if the complaint affirmatively shows the want of jurisdiction.

Coal Company *v.* Blatchford, 11 Wall., 172.

Second. The demurrer was properly overruled because it admitted the residence of defendant in the western district of Texas.

If the residence of the defendant in the western judicial district goes to the jurisdiction of the court, it should be averred in the petition; and it was averred that the defendant "is and was at the institution of this suit a resident of El Paso County in the State of Texas?" The demurrer admitted this jurisdictional fact, and the defendant was thereby concluded.

"Parties may admit the existence of facts which show jurisdiction, and the courts may act judicially on such an admission."

Railway Co. *v.* Ramsey, 22 Wall., 322, 327.

Third. The demurrer was properly overruled because it was per se a submission to the jurisdiction of the court.

Under the laws and practice of Texas, a defendant who appears for any purpose submits himself to the jurisdiction of the court.

Life Insurance Co. *v.* Hanna, 81 Tex., 487.
Sam *v.* Hochstadter, 76 Tex., 162.
York *v.* The State, 73 Tex., 651.
York *v.* State of Texas, 137 U. S., 15.

Pleading and practice in the circuit courts are governed by the law of the State.

Sec. 914, Rev. Stat. U. S.
Henderson *v.* Railway Co., 133 U. S., 61.

Fourth. The demurrer was properly overruled because the objection raised by it was simultaneously waived by asking for a continuance.

The demurrer concluded by asking, in the event of its being overruled, "time and leave to answer to the merits," and the defendant thus acknowledged the jurisdiction of the court, and waived its personal privilege.

McDonald *v.* Blount, 2 Tex. Ct. App., Civ. Cas., Sec. 344.
Stephenson *v.* Railway Co., 42 Tex., 162, 168.
Quinn *v.* Tilton, 2 Duer, 648.
Ayres *v.* West R. R. Corp., 48 Barb., 132.

"If by motion, or by any other form of application to the court, he (the defendant) seek to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally."

Porter *v.* Railway Co., 1 Neb., 15.
Aultman *v.* Steinan, 8 Neb., 109.
Mixell *v.* Kirkpatrick, 27 Kas., 679.
Cooley *v.* Lawrence, 12 How. Pr., 76.
Kelsey *v.* Covert, 15 How. Pr., 92.
Baxter *v.* Arnold, 8 How. Pr., 445.
McKenster *v.* Van Zandt, 1 Wend., 1.
Quick *v.* Merrill, 3 Cain, 133.
Dart *v.* Arnis, 19 How. Pr., 429.
Bromley *v.* Cook, 13 Tex., 586.
Irvine *v.* Lowry, 14 Pet., 293.

On the same principle, it is held that a pleading which unites an objection to the jurisdiction and to the merits is a waiver of the objection to the jurisdiction.

Railway Co. *v.* Whiteley, 77 Tex., 126.
Bailey *v.* Dozier, 6 How., 23.
Sheppard *v.* Graves, 14 How., 505.
DeSobry *v.* Nicholson, 3 Wall., 420.
Jones *v.* Andrews, 10 Wall., 327.

Railway Co. *v.* McBride, 141 U. S., 127.
Railway Co. *v.* Cox, 145 U. S., 593.

Fifth. The demurrer was properly overruled because the defendant had waived its privilege, or was estopped from asserting it, by consenting to be sued in any district in which it had an agent.

The statutes of Texas (*supra*) not only provided for a suit in this district, and for service of process on the defendant's agent there, but required the defendant's acceptance of these provisions as a condition to its doing business in that State. The defendant is presumed to have assented to these provisions.

Insurance Co. *v.* French, 18 How., 404, 408.
Railway Co. *v.* Harris, 12 Wall., 65, 81.

"If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

Ex parte Schollenberger, 96 U. S., 369, 378.

The foregoing statutes of Texas were made for the benefit of its citizens, and, on principle, the acceptance of them by the defendant for its benefit estops it from pleading the Act of August 13, 1888, in violation of the agreement.

This Court has recently held that the terms citizen, inhabitant, and resident in that act are synonymous, and that the act differs from former acts regulating jurisdiction by omitting the provision authorizing suit in the district where the defendant may be "found"; but it does not decide that a defendant may not consent to be a resident of a particular district in a State, of which one of the parties is a citizen, for the purpose of being sued.

Shaw *v.* Quincy M'g Co., 145 U. S., 444.

It had already been decided that a corporation created by one State, and doing business in another State where it was subject to suit, and to the service of process on its agent, "must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil," so as to uphold the grant of administration there, and a suit by the administrator.

Life Ins. Co. *v.* Woodworth, 111 U. S., 138, 145.

The principle here ruled appears to be that a foreign corporation may acquire a secondary residence in a State for the purpose of service of process and suit. And upon this case, and upon others holding that for jurisdictional purposes citizenship and residence are not synonymous, (as in Parker *v.* Overman, 18 How., 137), it has frequently been held by the circuit courts that a foreign corporation may be sued outside of the district of its residence, if it consents to be so sued, some of the cases holding that it thereby becomes an inhabitant of the district in which the suit is brought.

Riddle *v.* Railway Co., 39 Fed. Rep., 290.
Zambrino *v.* Railway Co., 38 Fed. Rep., 449.
Scott *v.* Texas L. & C. Co., 41 Fed. Rep., 225.
Service Co. *v.* Lamson, 41 Fed. Rep., 833.
Gilbert *v.* Ins. Co., 49 Fed. Rep., 884.
Knott *v.* Ins. Co., 2 Woods, 479.
Mooch *v.* Ins. Co., 10 Fed. Rep., 696.
Runkle *v.* Ins. Co., 2 Fed. Rep., 9.
Ehrman *v.* Ins. Co., 1 Fed. Rep., 471.

A similar question was recently elaborately argued before Mr. Justice Harlan, who decided in favor of this secondary residence or inhabitancy for purposes of jurisdiction.

United States *v.* Railway Co., 49 Fed. Rep., 297.

It has been ruled that the jurisdictional qualification of residence may be waived by a mere pleading.

Sheppard *v.* Graves, *supra.*

Inhabitancy as a jurisdictional qualification may be thus waived.

Toland *v.* Sprague, *supra.*
Gracie *v.* Palmer, *supra.*
Railway Co. *v.* Harris, *supra.*
Atkins *v.* Fibre Co., 18 Wall., 272, 298.
Nat. Bank *v.* Morgan, *supra*, 132 U. S., 141.
Railway Co. *v.* McBride, 141 U. S., 127, 131.

Even citizenship may be thus waived.

Deputron *v.* Young, *supra.*
Carter *v.* Bennett, 15 How., 357.
Fitzgerald Co. *v.* Fitzgerald, 137 U. S., 98.
Hartog *v.* Memory, 116 U. S., 588.
De Sobry *v.* Nicholson, 3 Wall., 420.

A fortiori, it is submitted, the erroneous venue of a suit under the Act of August 13, 1888, may be waived by an agreement to be sued in a particular court, or the defendant may be estopped by his agreement from objecting to it.

"The inquiry is, not whether the defendant was personally within the State, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear or suffer a judgment by default."

Ins. Co. *v.* French, 18 How., 404, 407.

Sixth. The plaintiff in error is precluded from questioning the jurisdiction by its general appearance.

In Texas a party to a suit may appear by an attorney of the court.

Rev. Civ. Stat. 1879; Art. 1210.

A demurrer by an authorized attorney questioning the court's jurisdiction is an appearance.

New Jersey *v.* New York, 6 Pet., 323.

The demurrer below recites that the defendant appears specially to object to the jurisdiction "until the question herein is decided," and asks leave to plead to the merits if the demurrer is overruled. By its terms, therefore, the appearance was to be special only until the overruling of the demurrer, when it obviously became a general appearance to the merits.

"Such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

Railway Co. *v.* McBride, *supra.*

Seventh. The plaintiff in error is precluded from questioning the jurisdiction by pleading in bar after the overruling of the demurrer.

Since a demurrer in abatement to a declaration admits the facts stated, on being overruled the plaintiff is entitled to judgment.

Tyler *v.* Hand, 7 How., 573, 584.

Wherefore it is generally held that pleading over in bar withdraws the demurrer, and abandons the objection raised by it.

Wann *v.* McGoon, 2 Scam., Ill., 74.
Jarrett *v.* Wilson, 1 Ark., 137.
Tabor *v.* Bank, 48 Ark., 454.
Pickering *v.* M. etc., T. Co., 47 Mo., 457.
Jones *v.* Thompson, 6 Hill, 621.
Brown *v.* Railway Co., 18 N. Y., 495.
United States *v.* Boyd, 5 How., 29, 51.
Clearwater *v.* Meredith, 1 Wall., 25, 42.
Aurora *v.* West, 7 Wall., 82, 92.

Young *v.* Martin, 8 Wall., 354.
Campbell *v.* Wilcox, 10 Wall., 421.
Maxwell *v.* Stewart, 22 Wall., 77.
Stanton *v.* Embry, 93 U. S., 548.

The same rule obtains where there has been a plea in bar after a plea to the jurisdiction.

Davis *v.* Dickson, 2 Stew., Ala., 370.
Railway Co. *v.* Harris, 12 Wall., 65, 84.

"By one of those rules, believed to be without exception, it is ordained . . . that if, after such matters relied on, a defense be interposed in bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial and are waived."

Sheppard *v.* Graves, 14 How , 504, 510.

On the same principle it is held that, when objections to the jurisdiction and to the merits are made simultaneously by demurrer or by pleas, the question of jurisdiction is waived, (Cases cited *supra*).

Respectfully submitted,

D. A. McKNIGHT,
Attorney for Defendant in Error.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 403.

THE SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

ELIZABETH J. DENTON.

In Error to the Circuit Court of the United States for the Western District of Texas.

Brief for Plaintiff in Error in Opposition to the Motion to Dismiss or Affirm.

J. HUBLEY ASHTON,
Of Counsel.

Press of McGILL & WALLACE, Washington, D.C.

Supreme Court of the United States.

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vs.

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Brief for Plaintiff in Error in Opposition to the Motion to Dismiss or Affirm.

STATEMENT.

This is a motion by the defendant in error to dismiss the writ of error, in the above entitled cause, for want of jurisdiction, or to affirm the judgment of the Court below, if the record shall show the jurisdiction of this Court, on the grounds, as alleged, that the said "judgment is sustained by well-settled judicial decisions, and that the writ of error was taken for delay only."

The plaintiff in error respectfully maintains that this Court has unquestionable jurisdiction to review the judgment brought before it by the present writ of error; that there was no color for the motion to dismiss; and

that the decision of the Circuit Court upon the important question of its jurisdiction over this suit, assigned as error in the record, can not be sustained under the provisions of the Act of March 3, 1887, c. 373, § 1, as recently expounded, upon great consideration, by this learned Court.

The writ of error was sued out under the authority of the Act of February 25, 1889, chap. 236, entitled "*An Act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the jurisdiction of the Courts below*," which entitles this Court to review a final judgment of a Circuit Court of the United States which does not exceed the sum of five thousand dollars, upon a question involving the jurisdiction of the Circuit Court. (25 Stats., 693.)

The Act of March 3, 1887, c. 373, Sec. 1, entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes;' and to *further regulate the jurisdiction of Circuit Courts of the United States*, and for other purposes," as corrected by the Act of August 13, 1888, c. 866, confers upon the Circuit Courts jurisdiction, concurrent with the Courts of the several States, among other cases, of suits of a civil nature between citizens of different States, where the matter in dispute exceeds the sum of two thousand dollars, but provides that no civil suit shall be brought against any person in any other District than that whereof he is an inhabitant, (omitting the clause in the previous Judiciary Acts allowing a defendant to be sued in the District where he is "*found*"), and declares that "where the jurisdiction is founded only on the fact that the action is

between citizens of different States, suit *shall be brought only* in the District of the residence of either the plaintiff or defendant."

The peremptory provision of the Act, in limitation of the jurisdiction of the several Circuit Courts, reads as follows:

"But no person shall be arrested in one District for trial in another in any civil action before a Circuit or District Court; and *no* civil suit *shall be brought* before either of said Courts against *any* person by *any* original process or proceeding *in any other District* than that whereof he is an *inhabitant*, *but* where the jurisdiction is founded *only* on the fact that the action is between citizens of different States suit *shall be brought only* in the District of the residence of either the plaintiff or the defendant."

24 Stat., 522; 25 Stat., 434;
Shaw *v.* Quincy Mining Co., 145 U. S., 446.

By the Act of February 24, 1879, chap. 97, creating the Northern Judicial District of the State of Texas, and changing the Eastern and Western Judicial Districts of that State, the County of Red River constitutes a part of the Eastern Judicial District of Texas, and the Counties of El Paso and Presidio are within the Western Judicial District of the State.

20 Stats., 318.

With these statutes in force, the plaintiff below, Denton, on October 11, 1889, filed her petition at law in the Circuit Court of the United States for the Western District of Texas against The Southern Pacific Company, claiming damages from the defendant in the precise sum of $4,970 for negligently causing the death of her son, an employé of the company, in a collision of trains on the defendant's railroad.

The plaintiff alleged in her petition, that she was a citizen of the State of Texas, and resided in the County of Red River, in that State (that is to say, in the *Eastern* Judicial District of Texas); that the defendant was a corporation duly incorporated under the laws of the State of Kentucky, was a citizen of the State of Kentucky, and was a resident of El Paso County, in the State of Texas; that the defendant corporation was engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the City of El Paso, Texas into and through the Counties of El Paso and Presidio, and the City of San Antonio, Texas; and that the company was doing business as aforesaid, and had an agent for the transaction of its business in the City and County of El Paso, to wit, W. E. Jessup.

The petition then set out the facts constituting the plaintiff's supposed cause of action against the defendant for the amount of damages above mentioned.

Jurisdiction of the action was thus founded solely on its being between citizens of different States, and, therefore, by the Act of 1887, in its original form, and as corrected in 1888, the action could be brought *only* in the Judicial District whereof one of the parties was an inhabitant within the State of which that party was a citizen. (Shaw *v.* Quincy Mining Company, 145 U. S., 449.)

Under the rule declared by this Court, the Circuit Court of the United States for the Western District of Texas, upon the facts alleged in the petition, was without jurisdiction of the suit.

Independently of any question touching the "residence" of the defendant corporation, the suit was not brought in a State of which one party was a citizen, and in the District therein of which the party was a resident and inhabitant.

The Southern Pacific Company, appearing for the special purpose and no other of objecting to the jurisdiction of the Court over the suit, at the outset, and in the first instance, challenged and denied its jurisdiction, and invoked the judgment of the Court upon the jurisdictional question *alone*, without touching in any manner the merits of the case, by filing, under leave of the Court, the following demurrer:

"Now comes the defendant in the above cause, and by leave of the Court files its 1st supplemental answer or demurrer and says it is *for the special purpose and no other until the question herein raised is decided of objecting to the jurisdiction of this Court*, and defendant excepts and demurs to the plaintiff's first amended original petition, and says it appears therefrom that the plaintiff is a citizen of Texas, residing in Red River County, in said State (a County not within the Judicial District in which this cause is pending), and that the defendant is 'a corporation duly incorporated under the laws of the State of Kentucky,' and a 'citizen of the State of Kentucky,' though 'engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending easterly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio and the city of San Antonio,' Texas, and having 'an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup.'

"Wherefore it appears that this suit ought, if maintained at all in the State of Texas, to be brought in the District of the residence of the plaintiff,—that is to say, in the Eastern District of Texas,—and defendant prays judgment whether this Court has *jurisdiction*, and it asks to be dismissed with its costs, but should the Court overrule this demurrer and exception, defendant then asks time and leave to answer to the merits, *though excepting to the action of the Court in overruling said demurrer.*" (Rec., pp. 2, 3, folio 4.)

On April 9, 1890, the Court overruled this demurrer, thus raising the single question of its jurisdiction of

this suit upon the facts averred in the petition, and the defendant then and there *excepted to the ruling*. (Rec., p. 3, folio 5.)

The defendant then answered to the merits subject to its exception to the decision of the Circuit Court in overruling the demurrer.

The record states:

"The defendant's demurrer, raising the question of the Court's jurisdiction being *overruled*, the defendant *answered as follows, though excepting to the ruling of the Court in overruling said demurrer*:" &c. (Rec., p. 4.)

A trial was had, resulting in a verdict for the plaintiff in the sum of $4,515, on which judgment was entered by the Court. (Rec., p. 5.)

A motion for a new trial was filed by the defendant, one of the grounds of which was that "the Court erred in overruling the defendant's demurrer raising the question of the Court's jurisdiction." (Rec., p. 5, folio 9.)

On April 25, 1890, the Court overruled the motion for a new trial. (Rec., p. 5, folio 8.)

The decision and judgment of the Court overruling the defendant's demurrer to its jurisdiction, were made the subject of a bill of exceptions, signed and sealed by the Hon. T. S. Maxey, the District Judge, presiding in the case, which was filed April 25, 1890, as of the 9th of April, 1890, by and under the order of the Court. (Bill of Exceptions, Rec., pp. 6, 7.)

The bill of exceptions, after setting forth the defendant's demurrer (*supra*), states as follows:

"And the Court having inspected the same (the demurrer) as well as the pleadings of the plaintiff, and it appearing therefrom that the plaintiff is alleged to

be a citizen of Texas, residing in Red River County, in the Eastern Judicial District of said State, and that the defendant is a corporation created and existing under and by virtue of the laws of Kentucky, and is a citizen of that State, but operating a line of railway, doing business in and having an agent on whom process may be served in the County and Judicial District in which this suit is pending, and the Court *being of opinion that the facts alleged show this cause to be in the District of the residence of the defendant, and that it ought to take cognizance of the same*, overruled said demurrer in its judgment as follows:

[Order overruling demurrer.]

The defendant sued out this writ of error to reverse the final judgment against it for the error asserted in the action of the Court below upon the demurrer to its jurisdiction.

Assignment of Error.

The assignment of error, annexed to the transcript of the record, returned with the writ of error, under the rule of this Court, is as follows:

"Now comes the Southern Pacific Company, plaintiff in error, by its attorneys of record, and assigns the following as error committed in the proceedings had below:

"The Court erred in overruling the defendant's demurrer to the first amended original petition of the plaintiff, and in entertaining jurisdiction of the cause, for the reason that the jurisdiction was founded only on the fact that the action was between citizens of different States, the plaintiff being alleged to be a citizen of Texas, and the defendant a citizen of Kentucky; that it appeared from the pleading demurred to that the plaintiff resided in Red River County, Texas, (not in the Western District of Texas,) and that the defendant was a corporation created under the laws of Kentucky, and that the suit was not brought in the District of the residence of either the plaintiff or defendant." (Record, p. 10.)

The learned District Judge, in the Circuit Court, overruled the demurrer, as appears by the bill of exceptions, upon the ground that the defendant corporation, though created and existing under and by virtue of the laws of Kentucky, and a citizen of Kentucky, by operating a line of railway, doing business, and having an agent on whom process might be served, in the County and Judicial District of Texas in which the suit was instituted, became and was a resident of that District, and that as such and by such "residence" the company was amenable and subject to the compulsory jurisdiction of the Circuit Court of the United States for the Western District of Texas, in the present suit, under the Act of March 3, 1887.

This ruling, as we now know, proceeded from a misunderstanding of the effect of the restrictive and inhibitory provisions of that legislation, and a juridical view in regard to the "residence," or inhabitancy, of corporations of the States for the purposes of the power of the jurisdiction of the Circuit Courts over them under the statute, which this Court has since considered and rejected.

Judge Maxey, as the Court is aware from the discussion, at the last term, in *Shaw* v. *Quincy Mining Company*, had, in 1889, two years before the present case came before him, accepted the view, entertained by some other judges in the Circuit Courts, that the "residence" of a corporation was not confined to the limits of the State of its creation, but that the artificial body became a resident and inhabitant, within the meaning of the statute, of other States in which it had agents for the transaction of its corporate business, and might be sued, under the State laws, by service of process on such agents. (Zambrino *v.* G. H. & S. A. Ry. Co., 38 Fed. R., 449; Scott *v.* Texas L. & C. Co., 41 Fed. R., 225.)

The learned Judge, in the case of *Zambrino v. Galveston, H. & S. A. Ry. Co.*, in which he first announced his adherence to this doctrine, expressed his regret that "the amount in controversy was insufficient to authorize a revision of the judgment by the Supreme Court, whose decision of the question involved is essential to the establishment of a fixed and uniform rule."

It was, therefore, no doubt a satisfaction to the learned Judge, when he settled the bill of exceptions, that the Act of 1889 afforded the defendant in this case a remedy for any mistake committed by him in ruling upon its demurrer to the jurisdiction of the Circuit Court, which was apparently not shared by one of the parties to the present writ of error.

ARGUMENT.

FIRST.

This Court has jurisdiction, under the Act of February 25, 1889, to review the final judgment of the Circuit Court in this case, and there was no color for the motion to dismiss.

1. The Act of February 25, 1889, chap. 236, provides as follows:

"That in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the Court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions

of law as apply to other writs of error or appeals except as provided in the next following section.

"*Sec. 2.* That in cases of judgments or decrees mentioned in the first section of this Act, and heretofore rendered, where the period of limitation for taking writs of error or appeals in other cases has not expired, appeals or writs of error may be sued out at any time within one year after the passage of this Act."

This Act was the natural sequence and successor of the legislation in the Act of March 3, 1887, corrected by that of August 13, 1888, which radically changed, as recognized by this Court, the system of the jurisdiction of the Circuit Courts under the previous Judiciary Acts.

The object of the Act was to insure the correct and uniform interpretation of the recent statute defining the jurisdiction of the Circuit Courts, and confine those Courts, in the exercise of their powers, through the action of this Court, within the limits fixed by the new law.

The diversity of opinion, and conflict of decisions, in the Circuit Courts, in regard to the effect of the Act of 1887 upon the jurisdiction of those Courts in cases of suits against corporations, especially, required that the appellate power of this Court should be enlarged and exerted in the manner provided by the statute.

The statute, obviously, should receive such effect as will tend to promote the object of its enactment.

2. The final judgment in this case is reviewable by this Court upon the question of the jurisdiction of the Circuit Court over the suit, presented and preserved on the record by the defendant's demurrer to the plaintiff's petition in the action.

The petition purported to show upon its face that the Court in which the suit was instituted had lawful juris-

diction of the suit, under the Act of March 3, 1887, by averring that the plaintiff was a citizen of Texas residing in the Eastern District of that State, and that the Southern Pacific Company was a corporation and citizen of Kentucky doing business and having an agent for the transaction of its business in El Paso, in the Western District of Texas, upon the legal theory that the latter District constituted the District of the "*residence*" of the Company, in the meaning of the Act of 1887, and that, therefore, the Circuit Court of the United States for the Western District of Texas had the right to entertain jurisdiction over the corporation in this suit as instituted against it by a citizen and resident of the Eastern District of Texas.

The defendant contested this theory of the construction and effect of the Act, and presented *in limine* the question of the jurisdiction of the Court over it in the action by its demurrer to the jurisdiction, which was interposed specially for the purpose of raising, at the outset, the jurisdictional question alone, and denying the right of the Court to proceed with the suit upon the merits.

There was thus no appearance by the defendant in the first instance, in fact or effect, to the merits of the cause, and no voluntary submission of the person of the corporation to the jurisdiction of the Court in the suit.

The special appearance, in the first instance, for the sole purpose of challenging the jurisdiction of the Court, as expressed in the demurrer, did not waive the exemption claimed, if it could be waived, under the Act of 1887, or submit the defendant to the jurisdiction of the Court, according to established principles of law, and the settled rule in the Court below. (Harkness *v.* Hyde, 98 U. S., 479; Bank of Vicksburg *v.* Slocomb, 14 Pet.,

60; York *v.* Texas, 137 U. S., 20; St. Louis &c. Railway Co. *v.* McBride, 141 U. S., 127; Parrott *v.* Alabama Ins. Co., 2 Woods, 354; Meyer *v.* Herrera, 41 Fed. Rep., 65).

If the Court below had not jurisdiction over the action upon the facts alleged and well pleaded in the petition, under the Act of March 3, 1887, the defendant was entitled to a dismissal of the suit.

3. The objection to the jurisdiction, under the Act of 1887, was properly and effectually raised and presented to the Court by the demurrer, as the facts on which it was predicated appeared on the face of the petition.

Coal Co. *v.* Blatchford, 11 Wall., 172, 178;
U. S. *v.* Union Pacific R. R. Co., 98 U. S., 569;
Sadler *v.* Hudson, 2 Curtis, 6;
Halstead *v.* Manning, 34 Fed. Rep., 565;
Reinstadler *v.* Reeves, 33 Fed. Rep., 308;
Miller Magee Co. *v.* Carpenter, 34 Fed. Rep., 433;
Meyer *v.* Herrera, 41 Fed. Rep., 65;
Connor *v.* Vicksburg, &c., R. R. Co., 36 Fed. Rep., 273;
Campbell *v.* Duluth &c. R. Co., &c., 50 Fed. Rep., 241;
Laskey *v.* Newton Min. Co., 50 Fed. Rep., 634.

The Act of 1887, as corrected in 1888, effects a marked change in the former provisions of law respecting the jurisdiction of each one of the several Circuit Courts of the United States, and, as this Court has said, speaking by Mr. Justice Gray, "having taken away the alternative, permitted in the earlier Acts, of suing a person in the district '*in which he shall be found*,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the Dis-

trict therein of which he is an inhabitant and resident." (Shaw *v.* Quincy Mining Co., 145 U. S., 449; Smith *v.* Lyon, 133 U. S., 316.)

The original jurisdiction of the Circuit Courts over suits between citizens of different States being thus restricted by the Act, there can be no just doubt, that in a case where the facts as to the residence of the parties, respectively, as averred in the complaint, show affirmatively that the Circuit Court in which the suit is brought has no jurisdiction over the defendant in the suit under the statute, the defendant may assert his objection to the jurisdiction by demurrer to the complaint.

This principle has been affirmed, and the practice based upon it approved, by all the Circuit Courts, so far as we know, who have had occasion to consider the subject since the passage of the Act of 1887.

In *Coal Company* v. *Blatchford*, (*supra*), the Court said:

"Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the Court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the Court, and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits."

In the case of *U. S.* v. *Union Pacific R. R. Co.*, the Credit Mobilier case (98 U. S., 569, 579,) the jurisdiction of the Circuit Court *in personam* over the non-resident defendants, served with process out of the District of Connecticut, was raised and contested by simple motions to dismiss the suit as against those defendants,

upon the facts appearing on the face of the whole record, without any formal demurrers, pleas to the jurisdiction or in abatement, or motions to set aside the service.

In *Halstead* v. *Manning* (34 Fed. Rep., 565), a bill for the infringement of a patent, filed by a citizen of New York against a Connecticut corporation doing business in New York, in the Circuit Court of the United States for the Southern District of New York, the Court, Judge Wallace delivering its opinion, sustained a demurrer to the bill upon the ground that, under the Act of 1887, it had no jurisdiction over the defendant in the suit, because the bill showed that the party was not an inhabitant of the District.

Judge Wallace recognized the "radical change" made by the Act in the jurisdiction of the Circuit Courts.

The Circuit Court for the Eastern District of Missouri, in *Reinstadler* v. *Reeves* (33 Fed. Rep., 308), recognizing the same principle, held that where process appeared regular upon its face, and had been properly served upon the non-resident defendants, although they had at first entered a formal appearance to the suit, the defendants might afterwards assert their right under the Act of 1887 to be sued only in the District of their residence by demurrer to the bill, or motion to dismiss it.

The Circuit Court for the Southern District of Ohio had the same question before it in *Miller-Magee Co.* v. *Carpenter*, (34 Fed. Rep., 433), and held that where a bill showed on its face that the defendant was not an inhabitant of the District in which he was sued, he might assert his objection to the jurisdiction by demurrer as well as by motion to dismiss.

The Court said that it would not then decide the question whether the Act of 1887 conferred only a per-

sonal privilege on a defendant sued in the wrong Circuit Court, which he might waive, as under the earlier Acts, and that it was sufficient for the purposes of this case to hold, "that the *facts appearing on the face of the bill*, the defendant may assert his objection to be sued out of the District whereof he is an inhabitant by demurrer as well as by motion to dismiss."

The Circuit Court for the Eastern District of Missouri, in *Connor* v. *Vicksburg & M. R. Co.* (36 Fed. Rep., 273), again ruled, that where a petition showed upon its face that the Court is without jurisdiction over the defendant under the Act of 1887, no substantial reason existed why the defendant should not be permitted to move a dismissal of the suit, and that it was not necessary even to raise the objection by demurrer: it was wholly immaterial whether the jurisdictional question was raised by demurrer or by motion to dismiss the suit.

The subject was considered by the Circuit Court of the United States for the Western District of Texas, in *Meyer* v. *Herrera* (41 Fed. Rep., 65), which was a demurrer to the jurisdiction of the Court over the defendant as a non-resident alien: and it was there held, that it was not necessary that the objection should be raised by plea in abatement, and that where the facts as to the residence of the parties appeared upon the face of the petition, a defect in the jurisdiction under the Act of 1887 might be reached by demurrer.

The Court said :

"The preliminary question is whether the objection should be raised by plea in abatement. When the necessary facts appear upon the face of the petition, as in this case, the defect of jurisdiction may, in the absence of a general appearance, be reached by demurrer

interposed specially for the purpose. (Halstead *v.* Manning, 34 Fed. Rep., 565.) * * * Whether the defendant is suable, over his protest, depends upon the construction to be given to the Act of August 13, 1888. The defendant appears and says *in limine* that under the Act of Congress he can not be sued in the District without his consent, and submits that issue to the determination of the Court. It is thus evident that there is no general appearance in the cause, and no voluntary submission of the person to the jurisdiction of the Court, but a denial, in the first instance, of its right to proceed with the cause on its merits. The demurrer to the jurisdiction will be sustained, and an order entered dismissing the bill."

In *Campbell* v. *Duluth &c. Railway Co.* (50 Fed. Rep., 241), in the Circuit Court for the District of Minnesota, the Court sustained a motion to set aside the service and *dismiss* the bill on the ground that under the Act of 1887 the Court had no jurisdiction of the action, because the plaintiff was a citizen of a foreign country, and the defendant, a Michigan corporation, was not an inhabitant of the District in which the suit was brought.

The Circuit Court for the Southern District of California in *Laskey* v. *Newton Min. Co.* (50 Fed. Rep., 634), determined that where the jurisdiction of the Circuit Court is founded only on the fact of diverse citizenship, the complaint must show affirmatively that the plaintiff or defendant resides in the District, and that if it did not, a demurrer for want of jurisdiction would lie.

The Circuit Court, Judge Ross delivering the opinion, proceeded upon the view that the necessary residence is a jurisdictional requirement, which can not be waived, under the Act of 1887, and must be affirmatively shown by the complaint in the action in order to sustain the suit, discriminating in that respect between the earlier Acts and the existing law.

4. It is equally clear that the plaintiff in error could not lose its right to have the judgment on the verdict reviewed by this Court upon the objection interposed to the jurisdiction of the Court, by answering and going to trial after the demurrer was overruled, in any view of the limitation imposed by the Act of 1887 upon the jurisdiction of the Circuit Courts.

In *Harkness* v. *Hyde* (98 U. S., 479), this Court, speaking by Mr. Justice Field, said:

"Illegality in a proceeding by which jurisdiction is to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

In *Teal* v. *Walker* (111 U. S., 246), the Court said:

"The writ of error is not taken to reverse the judgment of the Court upon the demurrer to the complaint, for that was not a *final* judgment, but to reverse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and shows that upon the case as stated, the plaintiff can not recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict."

It is thus clear that after a special appearance for the purpose of objecting to the jurisdiction has been made,

and the objection overruled, the right to insist upon the objection on appeal or writ of error is not lost by a subsequent appearance to the suit upon the merits.

In the present case, therefore, the writ of error brings before this Court for review the order of the Court below overruling the objection interposed by the demurrer to the jurisdiction of the Circuit Court over the defendant in the suit under the Act of 1887.

5. It follows from what has been said that this Court has jurisdiction of the case, and that there was no color for the present motion to dismiss the writ of error.

The important question raised below in regard to the jurisdiction of the Circuit Court over the suit, is precisely such a question as it was contemplated by the Act of February 25, 1889 this Court should finally determine upon its merits.

SECOND.

The contention of the defendant in error that the question arising upon the demurrer relates to what is called a matter of "personal privilege," which could be waived, and is, therefore, not one involving the jurisdiction of the Circuit Court, is without support in the Act of March 3, 1887.

1. If the premises of the proposition were true as matter of law under the Act, the proposition itself would be unsound.

An objection that a defendant is exempt from liability to suit in a particular Court relates always and necessarily to the jurisdiction of that Court over the suit, and may be interposed by way of technical plea to its *jurisdiction*, or by demurrer to the jurisdiction if the facts appear upon the bill.

Even if it could be said, therefore, that the demurrer was based upon a personal privilege or exemption, claimed by defendant, and waivable by it, under the Act of 1887, the question upon the demurrer was nevertheless one involving the jurisdiction of the Court below, determinable upon this writ of error.

2. The absence of reasonable ground for the contention that the plaintiff in error waived the defect in the jurisdiction of the Court below upon which the demurrer relied, if it was the subject of waiver, seems to render it unnecessary to seriously consider the question, whether or not the party could have effectually waived such defect in the jurisdiction of the Court, under the statute of 1887, by any action in the case.

The question referred to, as we respectfully submit, is not concluded by the decision in the case of *St. Louis & San Francisco Railway Co. v. McBride* (141 U. S., 127), cited by defendant in error, which was disposed of on a motion to dismiss or affirm, without oral argument, and in which there was, apparently, no discussion—certainly no full discussion—of the important question of the effect of the provisions of the Act of March 3, 1887, upon the jurisdiction of each one of the several Circuit Courts of the United States, and the rights of parties in respect to suits in those Courts.

The suit in that case was in the Circuit Court for the Western District of Arkansas, by citizens of Arkansas residing in the Western District of the State, against a corporation and citizen of Missouri, doing business in the Western District of Arkansas.

If the jurisdiction was founded only on the matter of diverse citizenship, the suit was unquestionably brought in the proper Circuit Court, as was conceded.

This Court decided that the jurisdiction was founded upon diverse citizenship alone, and that the suit was *not*

based upon any Statute of the United States and to enforce any right given solely by such Statute, and that the case, therefore, was *not* one which must be brought in the District of which the defendant was an inhabitant.

The Court thus adjudged that the suit was brought in the proper Circuit Court, and the Court below had jurisdiction of it, under the Act of 1887; and the question of waiver, therefore, would seem not to have been a point presented for determinate decision in the case.

It was apparently unnecessary for the Court to decide what would have been the effect of the general appearance to the merits of the case, if it were true, as alleged by the defendant, that the case was not founded only on diversity of citizenship, and should have been brought in the District of which the defendant was an inhabitant, under the Act of 1887.

If it were necessary for the purposes of the present case, to consider the question as to whether the Act of 1887 can be deemed to confer merely a personal privilege in respect to the jurisdiction of the Court, which may be conclusively waived by appearance in a suit brought against a party in a District where the statute says *no suit shall be brought*, it is believed that the learned Court would regard the question as one open to discussion and determination.

3. The cases referred to in *St. Louis, &c., Railway Co.* v. *McBride* were upon the construction and effect of the earlier Judiciary Acts, which entitled those Courts to entertain jurisdiction not only over "inhabitants" of their respective Districts, but, also, over persons who were "*found*" there, at the time of service of process.

The determination, in those cases, that the statutes intended to confer upon a person, not permanently or temporarily in the territorial limits of the Court, an exemption from its jurisdiction in the nature only of a

personal privilege, which he waived by voluntarily appearing to the merits of the suit, was based upon the existence and effect of the "*found*" clause in those Statutes, which Congress, in revising, and, as it thought, reforming, the jurisdiction of the Circuit Courts, in 1887, carefully *omitted* from the Statute then passed upon that subject.

The present question, therefore, would seem not to be governed by the authority of the decisions under the prior Jurisdiction Acts.

The Act of 1887 entitles a Circuit Court to exercise jurisdiction *only* over "inhabitants" of its Judicial District, with the *single exception* of a suit founded solely on diverse citizenship, brought by a citizen and resident of that District, against a citizen and resident of another State.

With regard to *corporations*, it was clearly intended that a State corporation should not be sued in any Circuit Court of the United States, *outside its charter State*, except in an action based upon diverse citizenship in the Circuit Court for the particular District in which the plaintiff is a resident and inhabitant.

Considering that it was the object of the Act to narrow the sphere of the jurisdiction of the Circuit Courts of the United States, and that it takes away absolutely, as this Court has said, "the alternative permitted in the earlier Acts of suing a person '*in any District in which he shall be found*,'" it would clearly seem that Congress did not intend that any immunity or exemption from the jurisdiction of a Circuit Court arising under the Act, should constitute a personal privilege which might be effectually waived by a party to a suit in that Court.

Congress did not intend, as we would submit, that a Circuit Court should exercise any jurisdiction in a suit against a party who is not subject to its jurisdiction under the Statute; in other words, the right of juris-

diction was meant to be limited to those parties over whom the jurisdictional power of the Court was expressly extended.

The language of the clause in the 1st section of the Act of 1887, under consideration, would seem to be very clear and explicit and to strike directly and wholly at the question of the jurisdiction of each one of the several Circuit Courts of the United States, and this view appears to be sustained by the other provisions of the section.

The first clause of the section describes the jurisdiction common to all the Circuit Courts of the United States, viz.; "The Circuit Courts of the United States shall have original cognizance," &c. The clause now being considered distributes among the several Circuit Courts the suits which may be brought in them, respectively; that is to say, the suits of which each Circuit Court shall have jurisdiction, providing that "no civil suit *shall be brought* before either of said Courts against any person by any original process of proceeding in any other District than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit *shall be brought only* in the District of the residence of either the plaintiff or the defendant; nor shall any Circuit or District Court *have cognizance of any suit*," &c.

Under the old acts where the mere *finding* of a defendant within the District gave jurisdiction, the Court naturally held that when a defendant *appeared* in the suit the defendant was found in the District. When a *finding* in the District gave jurisdiction, the formal entry of an *appearance* in the suit in the District, of course, sufficed, but under the Act of 1887 the fact that the defendant is found in a District does not give jurisdiction, and in this respect the Act of 1887

differs, and was intended to differ, radically from the previous Judiciary Acts.

But, as we have already said, there does not seem to be occasion in this case for the full discussion of this question, which would seem desirable in a case where the defendant had entered a general appearance in the suit, or had failed to question the jurisdiction of the Court in the first instance.

THIRD.

The Court below erred in overruling the demurrer and in not dismissing the suit for want of jurisdiction; and in any view, therefore, of the motion to dismiss the judgment should not be affirmed by this Court.

1. It has been now determined that the phrase "*district of the residence of*" a person is equivalent to "*district whereof he is an inhabitant,*" in the Act of March 3, 1887, § 1; that the Act "restricts the jurisdiction to the District in which one of the parties resides within the State of which he is a citizen," in a suit founded on the diverse citizenship of the parties; and that, within the meaning of the Act, a corporation can not be considered a citizen or resident of a State in which it had not been incorporated. (Shaw *v.* Quincy Mining Company, 145 U. S., 451, 453.)

As it is averred in the petition that the defendant in error is a citizen of Texas, residing in the Eastern District of that State, and that the plaintiff in error is a corporation duly incorporated under the laws of the State of Kentucky, and is a citizen of that State, though doing business and having an agent for the transaction of its business in the city and county of El Paso, in the Western District of Texas, the petition discloses upon its face the fact, that the Court below had no jurisdiction of the suit under the Act of March 3, 1887.

The Act ordains that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit *shall be brought only* in the District of the residence of the plaintiff or the defendant," and thus requires a suit founded solely on the diverse citizenship of the parties to be brought, as this Court has said, "in the State of which one is a citizen, and in the District therein of which he is an inhabitant and resident."

Neither of these parties is a citizen of the State, *and* an inhabitant of the District in the State, in which the suit was brought.

If the defendant corporation, a corporation and citizen of Kentucky, not incorporated in Texas, could be, as it can not be, an inhabitant and resident of the Western District of Texas, in the meaning of the Act of 1887, it is not a citizen of Texas, nor is the plaintiff, though a citizen of Texas, an inhabitant and resident of the Western District of Texas, in which the suit was brought.

It is manifest, therefore, in the light of adjudicated doctrine, that the Circuit Court for the Western District of Texas had no jurisdiction of the suit.

2. The Court below, as appears, committed the twofold error of supposing that the Kentucky corporation, by doing business in the Western District of Texas, became an inhabitant of that District, and that as such it was subject to suit by a citizen of Texas, residing in the Eastern District of the State, in the Circuit Court for the Western District of Texas.

The demurrer did not admit that the Kentucky corporation, a citizen of that State, not alleged to be a corporation duly incorporated under the laws of Texas, was a *resident* of the Western District of Texas, for that averment must be deemed to be the plaintiff's own conclusion of *law* from the facts alleged in the petition

in regard to the business of the foreign corporation in that District.

The doctrine is elementary that "a demurrer admits only allegations of fact and *not* conclusions of law." (Pennie *v.* Reis, 132 U. S., 470; see also, Interstate Land Co. *v.* Maxwell Land Co., 139 U. S., 578.)

The Court, in the former case, said:

"If the pleading misstates the effect and purpose of the Statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges."

It was for the Court, therefore, to determine as matter of law, whether or not the defendant was, in the meaning of the statute, a resident and inhabitant of the Western District of Texas.

The Court concurred with the plaintiff in the conclusion of law drawn from the facts alleged in the petition as to the business of the corporation in Western Texas, and, in so doing, committed error, as we know from the decision of this Court in *Shaw* v. *Quincy Mining Company.*

But if the legal conclusion as to the residence of the corporation in Texas drawn by the Court from the facts averred in the bill, was correct, still the plaintiff had no right, by the Act of 1887, to sue the corporation in the Court below, and in supposing that the Act gave her such a right, upon the theory that the corporation resided in the Western District, the Circuit Court committed the second error in its judgment on the demurrer.

The statute definitely confines the jurisdiction to the Circuit Court for the District in which one of the parties resides in the State of which that party is a *citizen.*

3. The averment that defendant is "a resident of El Paso County, in the State of Texas," is not an allega-

tion of any fact *well pleaded* in the petition, and therefore is not admitted by the demurrer.

Being a corporation and citizen of Kentucky, as alleged, its place of residence is there, and *can be nowhere else*, unless it is, also, incorporated, and is another and distinct entity, under the laws of Texas, which is not alleged. (Ins. Co. *v.* Francis, 11 Wall., 210.)

In the case of *Insurance Co.* v. *Francis*, it was alleged that the New York corporation "*resided*," was "*located*," and "*doing business*" in Mississippi, but this Court said:

"Its place of residence is there (New York) and *can be nowhere else.* Unlike a natural person, it can not change its domicile at will, and although it may be permitted to transact business where its charter does not operate, it can not on that account acquire a *residence* there."

If the petition had alleged that defendant was chartered by the State of Texas, it would have shown that the defendant was a citizen of Texas, which could not be sued by the plaintiff, as another citizen of Texas, in this action in the Court below. (Memphis R. R. Co. *v.* Alabama, 107 U. S., 585.)

This Court, speaking by Mr. Justice Gray, in the case last cited, said:

"The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State, and, although incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which can not sue or be sued by another citizen of Alabama in the Courts of the United States. (Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 286; Railway Co. *v.* Whitton, 13 Wall., 270–283)."

In the absence of an allegation that defendant is duly incorporated under the laws of Texas, and is a citizen of

Texas, the averment that it is a *resident* of Texas is a meaningless allegation of an impossible fact, which is not well pleaded, and is not admitted by the demurrer.

FOURTH.

The grounds not specifically considered in the foregoing argument upon which the defendant in error asks that the judgment be affirmed without reference to the merits of the question of jurisdiction presented by the the demurrer, can not be maintained under the Act of March 3, 1887.

1. The position of the learned counsel that this suit was brought in the Court below *under* certain statutes of Texas, in regard to suits in the State Courts against foreign corporations doing business in the State, and service of process on their agents in such suits, and that the question relates merely to what is called the "venue" of the suit, or the proper service of process therein, can not be maintained.

The suit was not brought under these statutes of Texas, nor does the present question relate to the matter of process under them.

State laws can confer no jurisdiction on the Federal Courts, or enable them, by the use of State process, to acquire power over any person or corporation whom they are not entitled to reach by the law creating them. (Toland *v.* Sprague, 12 Pet., 328–330; Insurance Co. *v.* Morse, 20 Wall., 453.)

The service of process on an agent of the defendant in Texas could not subject it to the power of the Court in this suit, unless the suit was one within its jurisdiction under the grant in the Act of 1887, and in which process was authorized by the Statute to be issued against the defendant.

As the facts supposed to give the Court jurisdiction

under the Act appeared on the face of the petition, it was unnecessary to file a plea in abatement, or to move to set aside the service of process.

If upon the facts disclosed by the petition it was manifest that the suit was not within the jurisdiction of the Court, the process was void, and the defendant was entitled to demur to the petition, and to have the action dismissed for want of jurisdiction.

2. The second proposition that the demurrer admitted the residence of defendant in the Western District of Texas, and was, therefore, properly overruled, has been considered.

3. It is contended that the demurrer was *per se* a submission to the jurisdiction, and was therefore properly overruled.

The contention is based upon the view that the extraordinary conception of justice expressed by the statutes of Texas, by which, as construed, a special appearance for the sole purpose of questioning the jurisdiction of a State Court is converted into a general appearance and a submission to the jurisdiction, is equally obligatory upon the Courts of the United States in Texas; but this is a mistake.

It is true that by Rev. Stat., § 914, it is required that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts, shall conform *as near as may be* to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State," &c.; but the subject of the peculiar statutes of Texas referred to is not within the categories of practice, pleadings, or forms and modes of proceeding, in the meaning of that section; and if the section applies to that subject, it was not intended that these statutes were to be adopted, as

construed, with the effect of defeating the rights of parties and ends of justice in the Courts of the United States, or affecting the limitation upon the jurisdiction of those Courts under the Act of 1887. (Indianapolis, &c., R. R. Co. *v.* Horst, 93 U. S., 301; Phelps *v.* Oaks, 117 U. S., 239; Lamaster *v.* Keeler, 123 U. S., 376; Chateaugay Iron Co., 128 U. S., 554; Mutual Accident Association *v.* Barry, 131 U. S., 116).

Section 914 of the Revised Statutes had its origin in the code enactments of many of the States, and was intended to assimilate the forms and manner in which the parties should present their claims and defense, in the preparation for the trial of suits in the Federal Courts, to those prevailing in the Courts of the State.

The Texas law relates to the jurisdiction and power of the Courts of the State as affected by the appearance of parties, and does not relate to practice, pleadings, or forms of proceeding, as the terms are used in the Revised Statutes of the United States.

"The conformity is required," as said in *Indianapolis, &c., R. R., Co.* v. *Horst*, "to be 'as near as may be'—not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals."

This Court in *York* v. *Texas* (137 U. S., 15, 21) intimated its opinion in regard to the justice of the Texas legislation, and two of the judges, Mr. Justice Bradley and Mr. Justice Gray, deemed it to be a violation of the constitutional rights of defendants.

The Court below properly considered that the Texas rule in regard to appearances had no place in the administration of justice in the Courts of the United States, and rejected it as hostile to the fundamental principles of the Federal jurisprudence and judicature.

4. It can not be maintained that the objection to the jurisdiction was waived by asking time and leave to answer to the merits if the demurrer should be overruled, "*though excepting to the action of the Court in overruling said demurrer.*" (Rec., p. 3.) Such a request would have been implied, had it not been expressed, in the demurrer, which asked the opinion of the Court on the question of jurisdiction before the party decided on its own action.

5. It is argued for the defendant in error that the demurrer was properly overruled for the reason that under the statute of Texas of April 2, 1887 in relation to foreign corporations, cited in the Brief (p. 4), certain corporations organized under the laws of other States, doing business in Texas, were required, among other things, to authorize service of process to be made upon any officers or agents engaged in transacting their business in the State, and that the defendant is to be *presumed* to have assented to these provisions, and is estopped from pleading the Act of March 3, 1887, "in violation of the agreement."

The Texas Act of April 2, 1887 relating to foreign corporations, it may be mentioned, was declared to be unconstitutional by the Supreme Court of the State in the case of *Texas Land & Mortgage Co.* v. *Wortham* (76 Texas, 557); and the Act itself was repealed by the Act of April 3, 1888, substituting it and re-enacting with material changes the section quoted in the Brief for defendant in error; but the Act of April 3, 1888 ex-

pressly declares, in section 4, that its provisions "*shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway.*" (See Acts of Texas, 1889, pp. 87, 88.)

The Act of April 2, 1887, therefore, was not in force when the petition was filed, on October 11, 1889.

But without regard to the unconstitutionality of the Texas Act of April 2, 1887, or its repeal and alteration by the Act of 1888, it is manifest that no Circuit Court can acquire jurisdiction over any suit against a corporation created without the territorial limits of the State in which the Court is held, not expressly authorized to be brought therein by the Act of 1887, upon the ground of estoppel based upon the action of the corporation under a State law of that kind.

The Act of 1887 withdraws from the Circuit Court the former jurisdiction depending upon the consideration of the defendant being "*found*" within the District, and forbids any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in any State and District except the State and the District therein in which the plaintiff or defendant resides.

The decision in the case of *Ex parte Schollenberger* (96 U. S., 369, 375, 378), and other cases of that class, cited by defendant in error, was predicated upon the alternative provision in the Act of 1875, permitting jurisdiction to be exercised over persons "found" in a District other than that in which they reside; but such jurisdiction having been taken away by the existing Statute, it is clear that a Circuit Court can not entertain jurisdiction over suits against foreign corporations doing business in the State in which the Court is held, which are not expressly permitted to be brought before the Court by the Act of 1887, upon the ground that the de-

fendants have "consented to be found" where they do business by conforming to the requirements of the State law in regard to such corporations.

Under the Act of 1887 a Circuit Court can not entertain jurisdiction over any suit against a corporation created without the territorial limits of the State in which the Court is held, except a suit founded on the diverse citizenship of the parties, instituted against such corporation by a citizen of the State and resident and inhabitant of the District for which the Court is established. All other suits against a corporation created by a State other than that in which the Court is held, are forbidden to be brought before the Court and excluded from its jurisdiction by the Act of 1887.

Under that Act the jurisdiction of a Circuit Court over a suit against such a corporation depends on the character of the plaintiff as a citizen and resident of the Judicial District for which the Court is established.

6. A corporation does not waive an objection to the jurisdiction of the Court over it, by appearing and pleading by attorney to the jurisdiction of the Court. (Bank of Vicksburg *v.* Slocomb, 14 Pet., 65; Decker *v.* Belting Co., 11 Blatchford, 76.)

The point is not well taken, that when the demurrer was overruled it became a general appearance to the merits, which waived the objection to the jurisdiction. The demurrer, as expressed, can not be deemed to have such effect; but the rule is that it is only when the party enters a general appearance to the merits, *in the first instance*, that he can be deemed to submit himself to the jurisdiction of the Court. (Harkness *v.* Hyde, 98 U. S., 476; York *v.* Texas, 137 U. S., 20.) Here the defendant, with leave of the Court, appeared in the first instance solely for the purpose of challenging the jurisdiction over it in the suit; and the answer to the

merits was filed subject expressly to an exception to the action of the Court in overruling the demurrer. (Rec., p. 4, fol. 6.)

7. The subsequent defense on the merits did not waive the exception to the jurisdiction taken by the demurrer.

The defendant was not obliged to acquiesce in a judgment against it, as the condition of saving its rights in respect to the question of jurisdiction.

"He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation." (Harkness *v.* Hyde, 98 U. S., 479.)

Such is the settled doctrine of this Court.

It is respectfully submitted that the motion should be denied.

J. HUBLEY ASHTON,
Of Counsel for Plaintiff in Error.

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146 U.S. 202

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

v.

ELIZABETH J. DENTON.

Term No. 403.

In error to the Circuit Court of the United States for the Western District of Texas.

BRIEF OF ARGUMENT,

In Reply to Brief for the Plaintiff in Error.

STATEMENT OF FACTS.

It was erroneously stated at page 4 of the former brief filed in this Court for the defendant in error, that the Southern Pacific Company was doing business in 1889 under the Texas Act of April 2, 1887, counsel being then unaware that that act was repealed in April, 1889 (Texas Laws of 1889, p. 88).

The repeal of the act does not, however, affect the argument at page 11 of that brief, which is that, by the settled decisions of this Court, a corporation of one State may consent to be sued, or to be bound by service of process on its agent, in another State, and does so consent

if it does business in a State whose laws provide for such suit or service. The unconstitutionality or repeal of a statute requiring its formal consent, under penalty of a revocation of its license for failure to so consent, obviously does not remove the presumption of law that it consents by continuing to do business there.

In the leading case on this question there was no statute requiring the company's consent to such service of process, but it was held that the statute providing for such service created an implied condition precedent to the company's doing business in the State, and that "in legal contemplation" the company assented to it.

Lafayette Life Ins. Co. *v.* French, 18 How., 404.

This Court has since expressly upheld the statute of Texas providing for service of process on the resident agent of a foreign corporation.

Societe Fonciere *v.* Milliken, 135 U. S., 304.

MOTION TO AFFIRM.

The Merits of the Controversy.

The merits of the controversy raised by the motion to affirm are discussed under subhead "*Fifth*" at p. 11 of the brief heretofore filed. The proposition advanced in support of the motion is, *that the defendant below had consented to be summoned and sued in the Western District of Texas, and was therefore bound by the judgment.* To this the learned counsel replies that that proposition is disposed of by the case of Shaw *v.* Quincy Mining Company (145 U. S., 444), which settles the case at bar on the merits in favor of the plaintiff in error.

But the facts in that case and in this are not the same. That was a suit by a citizen of one State (Mas-

sachusetts) against a corporation of another State (Michigan) in a third State (New York), and the decision, not only necessarily, but in terms, is carefully restricted to those facts. Hence, that decision does not decide the case at bar.

The questions in the two cases are different. In the case at bar it is whether consent to be sued in a certain District, which is not the residence of either plaintiff or defendant, waives the privilege granted the defendant by the Act of August 13, 1888, or estops him from pleading it. But no such question arose in Shaw *v.* Quincy Mining Company, as is apparent from the statement of facts on which that decision was made.

The material facts in that case were that, whilst the Michigan Company was doing business in Michigan, it was authorized to hold stockholders' meetings in New York, and to have its principal office there; and the Court held that these things did not make it a resident or inhabitant of New York within the meaning of the Act of 1888. That was manifestly the sole question decided.

In so deciding the Court incidentally ruled that, as Congress, in the Act of 1888, had omitted the provision of the Acts of 1789 and 1875, authorizing suits against a person in any District "in which he shall be found," it intended that neither a natural nor an artificial person should be sued outside of the District of his residence, except in the District of the plaintiff's residence. This ruling is plain and perspicuous, but it has naught to do with the case at bar on the merits, which raises the question whether a defendant may not waive that privilege, or be estopped by agreement from pleading it.

Now, it has already been decided that the Federal District in which a defendant may be sued under the

Act of August 13, 1888, is matter of personal privilege.

Railway Co. *v.* Cox, 145 U. S., 593.
Railway Co. *v.* McBride, 141 U. S., 127.
Fitzgerald Co. *v.* Fitzgerald, 137 U. S., 98.

Consequently it may be waived; because "a party may waive any provision, either of a contract or a statute, intended for his benefit," (Shutte *v.* Thompson, 15 Wall., 151, 159.) It is waived by a mere pleading, or a technical appearance, as the above-mentioned cases decide; and *a fortiori*, it is submitted, it is waived by a contract to be sued in a particular District, or the defendant is estopped by the contract from pleading it.

It has been shown that the Southern Pacific Company, in consideration of a license to do business in Texas, consented to service of process on its agent in El Paso County, Texas—that is to say, in the Federal Western District of Texas—though it now claims that it is not bound by the contract, and asks the aid of this Court in repudiating it. In dealing with a similar attempt in *Ex parte* Schollenberger (96 U. S., 369), the Court refused its aid. In solving the question there raised, it held that the company's consent to be *served* in the District was a consent to be *found* there, within the meaning of the then-existing law. That ruling in its letter is not applicable to the case at bar, for the word "found" has since been eliminated from the law; but in spirit it soars above the technicality to which it was there bound, and, resting on its true sustaining principle, a consent *to be sued*, it governs this case as it did that. The opinion says:

"It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued

there . . . We entertain no doubt that it (the statute there involved) made the company liable to suit where this suit was brought . . . There cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies."

This was *the principle* underlying that decision, and in it is no word about a consent to be "found" in the jurisdiction. Neither of the two earlier cases on which this principle was grounded (Lafayette Insurance Co. *v.* French, 18 How., 404, and Railroad Company *v.* Harris, 12 Wall., 65) depended on a consent to be *found*. Both of them depended solely on a consent *to be sued*, and the jurisdiction was deduced from that in those cases, as it was in *Ex parte* Schollenberger.

In the last-named case the Court say: "They have agreed that they may be sued there, that is to say, that they may be found there;" but it is too patent for argument that this is a mere fiction of law made to satisfy the letter of the Act of 1875. The word "found" in that act in respect of a natural person means a bodily presence in the District, and a natural person could "*consent* to be found there" only by going there bodily. Hence a corporation, which must stand on the same footing as a natural person under the statute, can consent to be found in a foreign jurisdiction only by actually going into it; but as "it cannot migrate" it cannot do this, and therefore it cannot "consent to be found there"—except by a fiction. In fact, it really consents to be sued, though actually *not* found, there.

If a fiction was available under the Act of March 3, 1875, it is equally available under the Act of August 13, 1888. The latter act, by omitting the provision in the former for a suit in the Federal District where a defendant may be found, manifestly did not intend to obliterate the great principle, antedating all statutes of the United States on the subject, that a defendant may

yield up his privilege of exemption from suit in a particular jurisdiction by consenting to be sued there. In this case the company's agent resided in the Western District of Texas, for the express purpose of having process served on him in suits against it; and therefore, under the fiction *qui facit per alium facit per se*, the company itself resided there for the purpose of being sued. There is no question but that this Court decided in Life Ins. Co. *v.* Woodworth (111 U. S., 138), that a corporation might be deemed to acquire a "domicile" in a foreign State, and there is therefore no difficulty in now deciding that it may be deemed to acquire a secondary "residence" or "habitation" there within the meaning of the Act of 1888, if such a decision were necessary to prevent a failure of justice. Nor would it be doing any violence to the intent of the act, as deduced from the knowledge and expectation of its framers, for Congress must be deemed to be well aware of the fact that the Federal jurisdiction over corporations on the ground of diverse citizenship rests wholly on fiction.

Now, after the passage of the Act of 1888, and notwithstanding it, the Southern Pacific Company entered into a contract with the people of Texas, among whom was Mrs. Denton, to be "*sued in any court within this State having jurisdiction of the subject matter*," and therefore in the Circuit Court for the Western District of Texas (*Ex parte* Schollenberger, *supra*). In the conduct of its business it killed her son in the Western District of Texas, but she happened to live in the Eastern District, and the question was whether she must go into the State of Kentucky to sue the company, or whether the company must go unwhipped of justice because it had no agent (as appears by this record) in the Eastern District subject to service of process. In the courts of the State she might have sued within the ter-

ritorial limits of the Federal Court for the Western District, as has been heretofore shown, *because the company had consented to it;* and for the same reason, it is submitted, she might sue in the Circuit Court.

By Section 1 of the Act of August 13, 1888, the Circuit Court was given jurisdiction over this cause of action, and over these parties as citizens of different States, "*concurrent with*" the courts of Texas; and it is therefore not to be supposed that, in the same section, Congress intended to divest it of a part of that jurisdiction by the proviso under consideration. And further, it cannot be assumed that in an underhanded way, by omitting the provision in the Act of March 3, 1875, authorizing suit in a District where a defendant might be found, Congress specially intended to discriminate against the Federal jurisdiction over corporations. In fact, we know that this was not the case, for on consideration it struck out a paragraph in the original bill which made such a discrimination (Cong. Record, 49th Cong., 2d Sess., p. 613). Hence, the jurisdiction of a Circuit Court over a foreign corporation must be exactly commensurate with that over a non-resident natural person. Shaw *v.* Quincy Mining Company substantially so rules.

In a Federal Court a natural person can now only be sued in the Federal District of his own or the plaintiff's residence, and, singularly enough, in view of the change of the law's phraseology, in either instance he must be "found" there, in fact, for service of process; and so, by a fiction of law, a corporation defendant must be "found" in either Federal District before summons can be served on it. Heretofore it has been shown that the Southern Pacific Company consents to keep an agent in Kentucky, upon whom writs may be served, and if it had an agent in the Eastern District of Texas it would

be deemed to consent to be sued there. Consequently, a corporation, after all, can practically only be sued under the Act of 1888, where it consents to be sued, and on the other hand it always is "found" where it consents to be sued. The Act of 1888, therefore, was not intended to provide that a person, natural or artificial, should *not* be sued where he was *found*, or where he *consented* to be sued.

Wherefore the Act of 1888 was not intended to deprive a natural person of the right, recognized for centuries, of submitting himself to any tribunal of otherwise competent jurisdiction, if he so pleased; the exemption was for his benefit and might be waived. If the Southern Pacific Company were to sue Mrs. Denton in the Federal Court for the Western District of Texas, and she consented to appear and to be bound by the judgment, manifestly this Court would not vacate that judgment; and if Mrs. Denton sues the Southern Pacific Company in the same District, and the company consents to be bound by the judgment (as in Texas Pacific Co. *v.* Cox, and other cases, *supra*), the rule is the same. Wherefore it is already settled that a corporation *may consent* to be sued out of the District of its residence, in like manner as a natural person, under the Act of 1888.

As heretofore shown, it has been settled (in Insurance Co. *v.* French, and other cases, *supra*) that the Southern Pacific Company *has consented* to be sued in the Federal Courts for the Western District of Texas.

Why, then, should the jurisdiction not be upheld in the case at bar? There can be no reason found, in view of the said decisions, except that, having once consented to be so sued, the company is now attempting to repudiate the contract. But such repudiation is fraud, for Mrs. Denton, in common with other citizens of the State, acted on it, licensing the company to do

business there on the faith of it, and in doing business under that license the damage and wrong she complains of were done. It would, therefore, seem to be a case for the application of the doctrine of estoppel, as much so as if the company had once waived the statute of limitations and afterwards attempted to rely on it. (Randon *v.* Toby, 11 How., 493.)

The great principle underlying all the decisions of this Court on the subject, whether a natural or an artificial person is interested, is that a defendant may consent to be bound by a judgment in a jurisdiction where he is neither a resident, inhabitant, nor found, and that if he does so consent voluntarily no court will relieve him. It appears in the leading case of Insurance Co. *v.* French, where it was held that the vital question was, not whether the corporation was in the foreign jurisdiction, but whether it had consented to be treated as if it were there; in *Ex parte* Schollenberger, where it was said that, if citizenship were sufficient, a corporation might consent to be sued anywhere it pleased; in Life Insurance Co. *v.* Woodworth, where it was held that consent to be sued in a State was the equivalent of a domicile there; and in Pennoyer *v.* Neff (95 U. S., 714, 735), which sanctions the English doctrine, "that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment, in which that particular mode of notification has been followed, even though he may not have actual notice of them." Wherefore the technical ruling, by way of a legal fiction, that consent to be sued in a particular jurisdiction is a consent to be found or to reside there, is unnecessary, and it is submitted that there are at least two cases in which this Court have substantially so decided.

In *Ex parte* Louisville Underwriters (134 U. S., 488), citation was made in the Eastern District of Louisiana upon the agent of a corporation of Kentucky, to which service the corporation had consented. It was resisted on the ground that the defendant was not an "inhabitant," as required by the Act of August 13, 1888. The Court held that that act was not applicable, and it showed that the Act of March 3, 1875, and Sec. 11 of the Act of September 24, 1879, never had been in force in the Federal Courts sitting as courts of admiralty; and yet the service of citation was sustained, because the defendant had consented to be sued there, on the authority of Lafayette Ins. Co. *v.* French, *Ex parte* Schollenberger, and N. E. Ins. Co. *v.* Woodworth. That is to say, it was held that Federal Courts had jurisdiction of suits in admiralty against defendants not "inhabitants" of the State or district, if they had consented to be sued there, *without the existence of an enabling act authorizing suit if they should be "found" there.* Hence, that provision of the Act of March 3, 1875, was not necessary to confer jurisdiction upon non-resident defendants *who had consented to be sued in the court*, and therefore its repeal by the Act of August 13, 1888, did not change the law *in a case like that at bar.*

Railroad Company *v.* Harris (11 Wall., 65) is a still stronger case. The Baltimore and Ohio Railroad Company had been incorporated in Maryland, but it was licensed by the legislature of Virginia to do business in that State (66), and by Congress to do business in the District of Columbia (67), upon substantially the same terms that were provided in Maryland. At the date of the institution of the suit, it was provided by act of Congress that only a person who was "an inhabitant of or found within said District" could be

sued there (70), but there was no law authorizing the service of writs on the agents of foreign corporations residing there (69). The company pleaded in abatement that it was not an inhabitant, and not found, in the District (70), which the plaintiff traversed in his replications, relying on the act of Congress licensing it to do business there (71). The overruling of the demurrers to these replications was assigned for error (79). The Court held that the company was, by clear implication from the terms of the licenses, suable in Virginia and in the District of Columbia, because it had consented to those terms (83). And it then held that the pleas in abatement were bad (84). That is to say, the Court held that *a plea of not an inhabitant, or not found, under the statute, is no answer to a suit in a court where the defendant has consented to be sued.*

The Pleadings in the Case.

Both the merits and the technical questions in Railroad Company *v.* Harris were ruled on by the Court, and it is therefore expedient to reply briefly to the argument of the learned counsel for the plaintiff in error on the pleadings in the case at bar.

The first four points made in the former brief go to the unavailability of the demurrer in the court below, and the last two to its unavailability in this tribunal.

First. To this point it is replied that the want of jurisdiction appears on the face of the declaration. It may be so, as an inference from other facts stated, and as the result of a legal argument, *but not as a statement of fact.* The question being whether the declaration avers that the suit was brought in the District of the residence of the plaintiff or defendant, the answer is that it does. There are many cases in this Court which hold that jurisdictional allegations must be posi-

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tive, and not inferential: as, for example, that an averment of residence is not equivalent to an averment of citizenship (Robertson *v.* Cease, 97 U. S., 646). *E converso,* the averment of the citizenship of this corporation in Kentucky cannot be equivalent to an averment of its sole residence there, in a case where its residence is the jurisdictional fact to be determined, and particularly where its residence in Texas is specifically averred.

If it be suggested that it could only be a resident of Texas by being also incorporated there, the answer is *non constat* but that it is incorporated there. And if it be argued that then the Circuit Court had no jurisdiction, because both parties were citizens of the same State, the answer is that that objection cannot be entertained here, upon that assumed fact, because it was not raised in the Court below (cases cited p. 14 of former brief), or in this Court by the assignment of error.

Second. The reply to this point is that the allegation of residence is the plaintiff's conclusion of law from the facts recited (p. 24), or a meaningless allegation of an impossible fact (p. 27), in either of which events it is not admitted by the demurrer. It is obviously not an impossible fact, for the incorporation of the company in Texas would constitute it a resident there. Whilst dependent on statutory law, it is obviously not a conclusion of law, but a fact stated according to its legal effect, which is good pleading (Sullivan *v.* I. S. Mining Co., 109 U. S., 550, 555).

If the averment of name or of residence is erroneous, it must be reached by a plea.

Cartwright *v.* Tabert, 3 Tex., 261.
Tousey *v.* Butler, 9 Tex., 525.
Tryon *v.* Butler, 9 Tex., 553.
Gildart *v.* Grumble, 22 Tex., 15.

And where exemption from suit depends upon residence, the defendant must not only aver a residence elsewhere, but deny the residence alleged—for a person may well have two residences.

Crawford *v.* Carothers, 66 Tex., 199.

Third. It is urged that the statutes of Texas involved in this point cannot be held to confer a jurisdiction denied by the Federal law; but, as above shown, a suit in the Western District of Texas was a personal privilege which the defendant might waive, and if he did so (*i. e.*, submitted himself to the jurisdiction by a special appearance) no one is to blame but himself. He might have refused to appear, and yet have been amply protected if there was no jurisdiction (York *v.* State of Texas, 137 U. S., 15). If no ultimate harm is wrought by the statute in question, as the last-mentioned case has decided there is not, then it is a part of the Federal practice under Section 914 of the Revised Statutes; for Congress was therein aiming at uniformity of pleading and practice, and an innovation on established custom cannot be considered, so long as it is not destructive of legal rights.

Fourth. On this point it is maintained that the reservation by the defendant below, of the right to except to the ruling of the Court on the demurrer, prevented the application for a continuance from being a general appearance. A similar reservation was made in Railway Co. *v.* Whiteley (77 Tex., 126), but very properly without avail.

Sixth. The reply to this point is that the argument, that the special appearance was conditioned by its terms to be special only until the decision on the demurrer was made, is erroneous. To which it is only necessary to say that the language of the paper speaks